

THE DYNAMICS OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996: THE SPLITTING-UP OF AMERICAN FAMILIES

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Marta¹ has lived in the United States for over twelve years. Not once in that time has she visited her home in Durango, Mexico. She has spent the past twelve years as an undocumented

* I want to thank the founders of *The Scholar*, particularly Sonia Rodriguez (my editor), for their utmost support, dedication, and inspiration. Additionally, thank you to Professors Lee Terán and Cecelia Espenosa for their guidance and counseling throughout this project. I consider them forever to be my mentors.

I dedicate this paper to my parents and sisters who have demonstrated the strength and perseverance needed to succeed in a new country. Their presence in my life is the source of my inner strength and has made me who I am. Les dedico este escrito a mis padres que con su amor, apoyo y ejemplo me dieron valor para ejercer mi hispanidad con dignidad en un país nuevo. Gracias.

1. Her name has been changed to protect her identity. I am from a community where immigration issues are very prevalent. This is the story of a person whom I know closely and have an understanding of the immigration predicament she is in. No further identification of her nor her children will be provided.

immigrant.² Marta has three children, all born in the United States, making them citizens.³ Her husband, a legal permanent resident, was in the process of obtaining immigration information which would allow Marta to live in the United States as a permanent resident,⁴ when new immigration legislation that was

2. For purposes of this paper, an immigrant will be considered as a person wishing to obtain residency status in the United States, or a person already living in the United States whose purpose and intent is to remain in the United States. *See* Immigration and Nationality Act of 1952 (INA) § 101(a)(15), 8 U.S.C.A. § 1101(a)(15) (West 1999) (defining the different categories of non-immigrants and stating that those who do not meet the categories of non-immigrants are considered immigrants); *see also* STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 99-222 (2d ed. 1997) (stating that immigrants are those individuals who will enter the United States and intend to remain). A nonimmigrant, thus, is a person coming to the United States for a short, temporary period of time. *See id.* at 99 (explaining the difference between an immigrant and a non-immigrant). A person who enters the United States without inspection is said to have never entered the United States and will subsequently be referred to as an undocumented alien. *See id.* at 381-82 (distinguishing between being admitted into the United States and simply entering its borders). Inspection occurs when a person enters the United States through a legally designated check point. *See id.* at 327-28 (explaining the immigration law). The alien must enter through the border patrol crossings and be inspected by the border patrol officer. *See id.* (explaining the process of admission). The alien then provides the officer with the proper documentation allowing her to enter the United States. *See id.* (explaining the process of visa admissions).

If the alien does not have that proper documentation, the officer can refuse entry until that alien shows otherwise. *See id.* (clarifying what the new legislation requires). Crossing without inspection generally means that an alien enters the United States without going through the border patrol, and is living in the United States without the Immigration and Naturalization Service (INS) having any proof or idea that she is in the country. *See id.* (clarifying the definition of an undocumented person). The alien could have crossed the river illegally or could have gone through a border officer using false documentation or a false claim to citizenship. Even if that person has lived in the United States for a relatively long length of time, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) states that such person entered without going through the proper inspection process (or entered illegally or unlawfully) and is treated the same way that an entering alien would be. *See* INA § 212(a), 8 U.S.C.A. § 1182 (a) (West 1998). The years that the alien lived in the United States are not taken into account and are not recognized by the INS when excluding her from the country. *See* LEGOMSKY, *supra* note 2, at 327-28 (explaining a difference that is obvious between the new legislation of 1996 and that of 1952).

3. *See* U.S. CONST. amend. XIV, § 1 (stating that "[a]ll persons born . . . in the United States . . . are citizens of the United States and of the State wherein they reside").

4. Permanent residency is granted to an immigrant after several qualifications are met. *See* LEGOMSKY, *supra* note 2, at 99 (defining a lawful permanent resident). With a permanent residency status, an immigrant can enjoy many of the advantages that a citizen enjoys: reside, travel, work, and attend school in the United States; and is eligible for some protection from the United States Constitution. *See id.* People who are granted this status are referred to as legal permanent residents or as permanent residents. *See id.* (defining the term given to immigrants remaining in the United States). Such people are given an

passed in 1996 changed the rules of sponsorship.⁵ Unfortunately, because of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Marta has been unable to become a permanent resident since her husband does not meet the required 125% income level that the law now requires.⁶

Although a family member could petition⁷ for Marta's residency, Marta must also satisfy several other requirements

alien identification card, which some people refer to as a "green card". See *id.* (describing the resident alien card given to lawful permanent residents, which at one time was green although the cards are now pink).

In regard to travel outside the United States, a permanent resident can generally travel with no restrictions. However, if a permanent resident will be out of the country for more than 180 days, she will be considered as an alien seeking admission. See INA § 101(a)(13)(C)(ii), 8 U.S.C.A. § 1101(a)(13)(C)(ii) (West 1999) (describing the condition under which a lawful permanent resident will be considered seeking an admission into the United States).

5. See LEGOMSKY, *supra* note 2, at 1-2.

6. See INA § 213A(a)(1)(a), 8 U.S.C.A. § 1183a(a)(1)(a) (West 1999).

7. The process of applying for residency is very simple in theory, although in reality, the process can be time consuming and frustrating. If a person is eligible for some type of residency, either through the family-sponsored program, through employment, or through diversity, the first step is to apply and submit an application for permanent residency to the INS. See LEGOMSKY, *supra* note 2, at 131-32 (discussing the visa application process for immigrants). Family sponsored immigration basically entails the alien having a relative in the United States (either a spouse, a child, a parent, or a sibling) and having that relative sponsor the alien. See INA § 204, 8 U.S.C.A. § 1154 (West 1999). Sponsoring an alien requires the relative in the United States, either a U.S. citizen or a permanent resident, to submit an application for the alien to INS along with an affidavit of support so that the alien may not be considered a public charge. See INA § 213A, 8 U.S.C.A. § 1183a (West 1999).

Once the application has been received by INS, INS will schedule an interview with the petitioner (the sponsor) and the beneficiary (the alien wishing to receive residency) in the United States. See LEGOMSKY, *supra* note 2, at 327-28. Afterwards, the alien will have an interview with the consulate officer in the alien's native country. See INA § 204, 8 U.S.C.A. § 1154 (West 1999). If the consulate officer approves the visa, he will give the alien a temporary visa which she can use to enter the United States until she receives her permanent residency card. See LEGOMSKY, *supra* note 2, at 327-28. When crossing the border, the alien will be inspected by the border patrol officer. See *id.* The alien will have to provide the proper documentation to the officer. See *id.* Once the officer determines that the alien is eligible, she will be allowed entry into the United States. See *id.* If at any point during the process the alien is denied admissibility, she has the right to appeal that decision. See LEGOMSKY, *supra* note 2, at 330.

The alien will be issued her visa, only when her priority date becomes due. See *id.* The priority date is the date the application was received by INS. See INA § 203(e)(1), 8 U.S.C.A. § 1153(e)(1) (West 1999) (describing the immigration priority date to have priority in determining who obtains legal permanent residency at a particular time); see also LEGOMSKY, *supra* note 2, at 330. The process of priority dates was established because of the backlog of applications experienced by the INS. See LEGOMSKY, *supra* note 2. Usage of the priority date is important, as it determines when an alien will receive her

besides the petition.⁸ Marta's situation is not unique, rather it is a common circumstance for many undocumented immigrants. Ultimately, Marta is barred from obtaining permanent residency by three sections of the immigration act.⁹ As noted above, Marta's husband has to attain an income level which equals an amount that is 125% above the poverty level.¹⁰ Unfortunately, Marta's husband does not earn that much in a year. Also, Marta cannot leave the United States because if she does so, she will be subject to a ten-year ban imposed by another section of the immigration act.¹¹ Finally, even if Marta were to gain permanent residency, she would not be able to remain conditionally in the United States until her visa becomes available.¹² Therefore, Marta would be forced to leave the United States to obtain her visa and the ten-year bar would begin.

In spite of her situation as an undocumented immigrant, Marta is a role model for her children. Marta is active in the children's schools, as well as her church. Her children are good students who mind their mother. Marta is caring and guides them well.

permanent resident card. See INA § 203(e), 8 U.S.C.A. § 1153(e) (West 1999) (explaining that the closer in familial relationship a person is to the sponsor, the faster her visa petition will be approved).

Once a person has qualified for a visa and is simply waiting to receive the identification card, she can apply for an adjustment of status. See INA § 245, 8 U.S.C.A. § 1255(a) (West 1999). Adjustment of status allows the applicant to obtain her status at the local INS office and therefore, avoid travelling abroad. It is limited to those who have a valid visa available. See *id.* (permitting the alien to remain in the United States and not leave her home to attend the consulate interview); see also LEGOMSKY, *supra* note 2, at 365-67. Through the adjustment, she is allowed to interview with INS, to receive her visa, and does not have to travel abroad for the visa. See INA § 245, 8 U.S.C.A. § 1255(a) (West 1999).

8. See INA § 212, 8 U.S.C.A. § 1182 (West 1999) (providing a list of requirements an alien must meet before she is approved, such as adhering to certain health requirements; not having criminal convictions; and not being a threat to the security of the United States or its people).

9. See INA §§ 212(a)(4) and 212(a)(9), 8 U.S.C.A. §§ 1182(a)(4) and 1182(a)(9) (West 1999) (detailing amendments made by the 1996 legislation which includes a bar prohibiting immigrants from migrating, a public charge doctrine).

10. See INA § 213A(a)(1)(A), 8 U.S.C.A. § 1183a(a)(1)(A) (West 1999).

11. See INA § 212(a)(9)(B)(i)(II), 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (West 1999) (providing for a ten year ban when an immigrant has been residing in the United States without proper documentation for longer than one year).

12. See INA § 245(i)(1)(B)(i), 8 U.S.C.A. § 1255(i)(1)(B)(i) (West 1999) (acknowledging the fact that people, who are residing illegally in the United States, will not be able to obtain adjustment of their status inside the United States unless they filed an application for such status on or before January 14, 1998).

Despite her good conduct, Marta is now in removal¹³ proceedings due to her undocumented status. If she loses, the Immigration and Naturalization Service¹⁴ will deport her to Mexico. Since Marta is not eligible for other relief, her only solution will be to separate from her family or risk other serious penalties.

13. See INA § 101(a)(47)(A), 8 U.S.C.A. § 1101(a)(47)(A) (West 1999) (providing for an order of deportation from the United States to occur after a special inquiry officer, or other such administrative officer, concludes that an alien is deportable). The INA created different types of grounds upon which the alien could either be excluded or deported. See INA § 237, 8 U.S.C.A. § 1227 (West 1999). Some of the deportability grounds are: inadmissibility at time of entry (where the alien should not have been admitted because she did not meet all of the requirements); smuggling undocumented aliens into the country; committing marriage fraud (or helping somebody commit marriage fraud); criminal conviction; falsifying documents; and security related grounds. See INA §§ 237(a)(1), (a)(1)(E), (a)(1)(G), (a)(2), (a)(3), (a)(4), 8 U.S.C.A. § 1227(a)(1), (a)(1)(E), (a)(1)(G), (a)(2), (a)(3), (a)(4) (West 1999). Even if a person becomes a permanent resident, she can be removed (or deported) if she meets any of the above grounds. See INA § 237(a), 8 U.S.C.A. § 1227(a) (West 1999).

Some waivers do exist for deportability grounds as well. With these waivers, people facing removal can seek relief before the Immigration Judge. For example, if an alien was convicted of smuggling undocumented aliens, the Attorney General has discretion based on the alien's ties to the community and family in the United States to allow that person to stay in the U.S. See INA § 237(a)(1)(E)(iii), 8 U.S.C.A. § 1227(a)(1)(E)(iii) (West 1999) (describing waivers that apply to family reunification). Another waiver exists when the alien commits certain misrepresentations but is the immediate relative, such as a spouse, parent, son, or daughter, of a U.S. citizen or legal permanent resident and has a visa allowing her admission to the United States. See INA § 237(a)(1)(H), 8 U.S.C.A. § 1227(a)(1)(H) (West 1999).

Some exclusion grounds include: health related grounds (for people having a communicable disease); criminal related grounds (for a person having committed a crime involving moral turpitude); security and related grounds (for people trying to enter the U.S. to commit a crime against the government); public charge (for a person lacking ability to provide for herself); a person who entered illegally into the United States; and aliens previously removed. See INA §§ 212a(1)-(4), (6) & (9), 8 U.S.C.A. §§ 1182a(1)-(4), (6) & (9) (West 1999). There are some waivers that exist, though, so that an alien should not be excluded. For example, one of those waivers is applicable for a person who committed a crime when she was a minor. Thus she will not be subject to any criminal deportability grounds and will not be deported. See INA § 212(a)(9)(B)(iii)(I), 8 U.S.C.A. § 1182(a)(9)(B)(iii)(I) (West 1999) (defining the waiver whereby "[n]o period of time in which an alien is under eighteen years of age shall be taken into account in determining the period of unlawful presence in the U.S.").

14. The Immigration and Naturalization Services (INA) is the agency under the Department of Justice which handles immigration and naturalization issues. See LEGOMSKY, *supra* note 2, at 1 (outlining the act and the federal immigration agencies).

I. INTRODUCTION:

At a time when the United States and Congress are speaking of "family values,"¹⁵ their actions reveal a blatant disregard for the families of undocumented immigrants. Congress has conspicuously forgotten the notion of family values in instances where one parent of a United States citizen is undocumented.¹⁶ Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,¹⁷ more and more families are being separated.¹⁸ Specifically, this comment will discuss three sections of the INA that were affected drastically by the 1996 reform, IIRIRA, and show how two years later, the three sections of the Act have indeed had the effect of separating families of mixed citizenry.

15. Andrew M. Greeley, *A Two Edged Sword*, RELIGION NEWS SERV., Jan. 27, 1999, available in 1999 WL 6630551 (claiming that Congress often has a hypocritical view when family values are discussed). J. R. Moehring, *Rep. Barr Inspires Loyalty, Loathing in Home District*, L.A. TIMES, Jan. 19, 1999, at A15 (declaring how Georgia Rep. Bob Barr keeps stressing family values). See *The Culture War Clinton's Impeachment is One of the Battles*, THE REC., N. N.J., Jan. 24, 1999, at 2 (describing how the Republican Party "preaches" family values); see generally William Saletan, *Bill Clinton's Family Circus, the U.S. President Is Doing His Best to Obscure His Adultery by Reinventing 'Family Values'*, THE GLOBE AND MAIL, Jan. 22, 1999, at A17 (claiming that the Republican Party embraced family values to their liking).

16. See Bill Piatt, *Born As Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988) (providing a discussion on differences between children of U.S. citizen parents and those of undocumented parents). Families are being separated without regard to United States citizens' children's right to a family because of the newly passed Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). This comment will discuss sections that will have the ultimate effect of separating families, whether the family members are American citizens, permanent residents, or undocumented immigrants.

17. See LEGOMSKY, *supra* note 2, at 109-10. I will refer to these amendments, collectively, as IIRIRA.

18. See Guillermo X. Garcia, *Diplomacy's Other Side: Immigration: The Salvadoran Consul in O.C. Promotes Culture, but She Also Has Some Grim Tasks*, THE ORANGE CO. REG., Jan. 3, 1998, at B01; see also Georgia Pabst, *Fond du Lac Man Distraught as Law Keeps Wife Out of U.S. Immigrant, Others Push to Speed Up Entry for Spouses, Children Who Are Barred from Even Visiting Them Here*, THE MILWAUKEE J. SENTINEL, Dec. 1, 1997, at 5; Carl Shusterman, *Immigration Law is Open to Abuse*, THE NAT'L L.J., Nov. 3, 1997, at A25 (predicting that the law will separate families of aliens who are in the United States illegally).

Section 212(a)(4)¹⁹ of the INA pertains to immigrants being a "public charge" to the United States. This section concerns a sponsor's²⁰ income affidavit which must be presented to the INS when petitioning for an alien. In 1996, IIRIRA amended § 212(a)(4) to increase the income requirement that a sponsor must meet in order to petition for someone else, i.e. a family member from 100% of the poverty level.²¹ Due to the increase in the income standards and low wages earned by immigrants, fewer individuals meet the affidavit requirements. Section 212(a)(4) has the effect of making it more difficult for immigrants to meet the income requirements and thereby forcing more families to separate.

Another section, 212(a)(9),²² sets a rigid punishment for immigrants who resided in the United States without the proper documentation. INA § 212(a)(9) creates a new ban to admission of immigrants. For the first time, a potential immigrant who accumulated designated periods of

19. See INA § 212(a)(4), 8 U.S.C.A. § 1182(a)(4) (West 1999). Section 212(a)(4)(B)(ii) states: "the consular officer or the Attorney General may also consider any affidavit of support under section 1183a [213A] for purposes of exclusion under this paragraph." INA § 212(a)(4)(B)(ii), 8 U.S.C.A. § 1182(a)(4)(B)(ii) (West 1999). Section 212(a)(4)(C)(ii) provides for aliens being solicited by a family member to have "... the person petitioning for the alien's admission (including any additional sponsor) ... [and to have] executed an affidavit of support described in section 1183a of this title with respect to such alien." INA § 212(a)(4)(C)(ii), 8 U.S.C.A. § 1182(a)(4)(C)(ii) (West 1999). Section 213A(a)(1) of the INA, in effect, describes the affidavit. The affidavit makes clear that the alien will not be a public charge where "(A) ... the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable; (B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State, (or any political subdivision of such State) or by any other entity that provides any means-tested public benefit. ...; and (C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2) of this section." INA § 213A(a)(1), 8 U.S.C.A. § 1183a(a)(1) (West 1999).

20. See INA § 204(a), 8 U.S.C.A. § 1154 (a) (West 1999) (describing that a person can petition for a family member if both of them are related). A sponsor is a person who petitions for an immigrant and her family. See *id.*

21. See LEGOMSKY, *supra* note 2, at 316-18 (noting that IIRIRA caused differences in the affidavit of support requirement, primarily increasing the limit to 125%).

22. See INA § 212(a)(9)(B)(i), 8 U.S.C.A. § 1182(a)(9)(B)(i) (West 1999) (defining time limits for unlawful presence in the United States which create a bar to admission from outside the United States).

Any alien ... who was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States ... prior to the commencement of proceedings under section 235(b)(1) or section 239(a), and again seeks admission within 3 years of the date of such alien's departure or removal, or has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Id.

"unlawful presence" is barred from admission into the United States from outside the country.²³ This is not a bar to internal adjustment if the alien qualifies for adjustment under the Act.²⁴ There are no waivers of the bar, even if the alien becomes eligible for a visa²⁵ in the interim. If the unlawful presence was for one year or more, a ten-year bar is imposed.²⁶ The effect is a system which separates many families of mixed citizenship.²⁷

Until January 14, 1998, applicants ineligible for 245 adjustment of status due to an illegal entry could avoid adverse consequences by paying a substantial penalty fee to adjust their status inside the United States.²⁸ Under the old law this effectively waived the illegal entry and under the amendment of 212(a)(9) it would preclude the 212(a)(9) bars from becoming effective. The repeal of § 245(i)²⁹ will have a devastating effect on immigrant families.³⁰ A person who paid the \$1000 fine, as a penalty for entering the United States illegally, could receive such an adjustment

23. INA § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 1999).

24. *Id.* See INA § 212(a)(9)(B)(i), 8 U.S.C.A. § 1182(a)(9)(B)(i) (West 1999).

25. See INA § 101(a)(16), 8 U.S.C.A. § 1101(a)(16) (West 1999) (defining the term as "[a]n immigrant visa required by this Chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this Chapter").

26. See INA § 212(a)(9)(B)(i)(II), 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (West 1999) .

27. This comment will show how different families residing in the United States will be separated by the new legislation found in IIRIRA.

28. See INA § 245(a), 8 U.S.C.A. § 1255(a) (West 1999) (defining an adjustment of status as the process where individuals can become permanent residents without leaving the country).

29. See INA § 245(i), 8 U.S.C.A. § 1255(i) (West 1999) (stating circumstances for which adjustment of status, for certain aliens physically present in the United States, may be allowed). The provision states that

[A]n alien physically present in the United States who entered the United States without inspection; or is within one of the classes enumerated in subsection (c) of this section; and who is the beneficiary . . . of a petition for classification under section 204 of this title that was filed with the Attorney General on or before January 14, 1998; or an application for a labor certification under section 212(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1,000 as of the date of receipt of the application.

Id.

30. *Id.* This comment will demonstrate how different families will be affected by the repeal of the statute which allowed them to adjust their legal status without leaving the country.

when their visa was available.³¹ With the repeal of § 245(i) and the inability of immigrants to remain in the United States, it is only logical that the end result would be separation. Together, these three sections adversely affect immigrant families in the United States because undocumented immigrants, forced to leave the country so they may apply for visas, will be held inadmissible under § 212(a)(9).³²

The Immigration and Naturalization Act (hereinafter INA) of 1952 provided a basis for family-sponsored immigration because it sought to conserve a unified family.³³ With the 1996 reform, and specifically §§ 212(a)(4), 212(a)(9), and the elimination of § 245(i), the INA will have the ultimate negative effect of separating immigrant families who are already in the United States or are attempting to immigrate to the United States. Even though many more sections exist which will have the effect of dispersing families, these three sections must and will be looked at more closely because prior to passage of the IIRIRA, many families relied on them to remain together (i.e. gain permanent residency status).³⁴ Part II of this comment will discuss background information necessary to understand the different changes caused by IIRIRA. Part III of this comment will discuss how § 212(a)(9) is affecting immigrant families in the United States. The effect of section 245(i) on families of mixed citizenship is discussed in part IV of this comment. Finally, Part V discusses the separation of families that will occur with section 212(a)(9). This comment will discuss these sections and their ultimate effects on families – especially those families consisting of American citizens, legal permanent residents, and undocumented immigrants. This comment will end by pro-

31. See INA § 245(i)(1)(A)(B), 8 U.S.C.A. § 1255(i)(1)(A)(B) (West 1999) (outlining the qualifications and fees for the adjustment of status of certain aliens physically present in the United States).

32. See INA § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 1999).

33. See LEGOMSKY, *supra* note 2, at 131 (stating that immigration laws enacted in 1952 promoted, for the first time, a comprehensive group of preferences in support of family unity); Austin T. Fragomen & Steven C. Bell, *Family Sponsored Immigration*, 1001 PLI/CORP. 59, 61 (1997) (stating that "[o]ne of the principal objectives of the Immigration and Nationality Act (INA) is family reunification").

34. See INA § 237, 8 U.S.C.A. § 1227 (West 1999) (listing deportability grounds, one of which includes aggravated felonies); see also Justice E. Goodman, *People v. "John Doe"*, 211 N.Y.L.J. 22 (1994) (explaining why the court will not review § 237 and why deportation of an aggravated felon should take place); Mirta Ojito, *Immigrant Fights Off Threatened Deportation*, N.Y. TIMES NEWS SERV., Sept. 4, 1998, available in 1998 WL-NYT 9824703400 (telling the story of an alien with a criminal background, who was almost deported until the court dismissed the case against him); Frank Trejo, *The Long, Long Arm of Immigration Law Old Crimes Are Leaving Legal Residents Open to Deportation Under New Rules*, THE DALLAS MORNING NEWS, Nov. 18, 1997, at 1A (describing examples of aliens who will be deported based on their criminal records regardless of how long they have been in the United States).

posing that Congress institute another legalization program similar to the 1986 legislation and allow many undocumented immigrants to gain residency.

II. BACKGROUND

A. *The Historical Aspect of Separation of Families*

Separation from one's family has traditionally been viewed as one of the worst punishments inflicted on an individual.³⁵ The Supreme Court has held that deportation causes the separation of families and is a "drastic sanction, one which can destroy lives and disrupt families."³⁶ People in countries around the world have generally valued the concept of family.³⁷ This country has criticized women who separate from their children.³⁸ Mothers abandoning their children are generally thought to be "bad mothers" or selfish and uncaring.³⁹ Mothers who separate from their children "are regarded as misguided, selfish, [and] unnatural."⁴⁰ Even fathers who do not provide for their children or abandon them, are classified as "deadbeats"⁴¹ and "uncaring".⁴² Society in the U.S. has

35. See Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 376 (1996) (portraying the separation of mothers from their children as evil and harmful to families); see also Enid Trucios-Haynes, "Family Values" 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family, 36 BRANDEIS J. FAM. L. 241, 241 (1997) (describing how the new immigration laws emphasize only the nuclear family, and will eventually cause the separation of extended families).

36. *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963).

37. See Sanger, *supra* note 35, at 376 (stating that separating from one's child is "the greatest of maternal sacrifices" and providing London, England, as an example of how a country views family separation).

38. See *id.* at 377 (detailing how mothers who separate from their children are criticized); see also Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 901 (1998) (describing how women have been stereotyped into becoming mothers, taking care of their children, and placing their children above all else); Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 811-12 (1998) (stating that one side of the debate on family claims how families are disintegrating and how families should work more towards staying united).

39. See *id.* at 387 (stating how women are viewed as "ill-motivated" when they separate from their children).

40. *Id.* at 377.

41. Kathleen Parker, *Chasing Deadbeat Dads Is a Dead-End Game*, GRAND RAPIDS PRESS, Jan. 28, 1999, at A17.

42. Tony Sewell, *Alive and Kicking: Time to Ease Off Baby Fathers*, THE VOICE, June 29, 1998, at 11 (describing the circumstances which lead to the stereotype that Black fathers are uncaring). See also Child Support Enforcement: *Child Support Oversight Hearing: Before the Subcomm. on Hum. Resources of the House Comm. On Ways and Means*, 106th Cong. (1998) (statement of Jeffrey Cohen, Director, Vermont Office of Child Support) (stating that the child support process is "characterizing fathers as criminals"); Bruce Elder

strongly enforced the notion that ties to the family are the strongest a person can have, and family has traditionally been valued.⁴³

The U.S. has tried to keep families together through several methods. For instance, in divorce proceedings the courts provide ways for the children to be with both parents.⁴⁴ Even in child abuse cases, courts stress the importance of keeping children with their natural parents.⁴⁵ The state has tried methods to conserve family unity even in situations where it would seem that separation would ultimately be in the best interests of the children.⁴⁶ With the application of IIRIRA, specifically §§ 212(a)(4), 212(a)(9), and 245(i), the federal immigration laws ignore those ties and force families to separate simply because of their citizenship.⁴⁷

B. *Constitutional Rights of Families*

The Supreme Court has determined that the right to a family is fundamental.⁴⁸ The Court has also established that children have a fundamental right to be with their parents.⁴⁹ The 1996 amendments to the INA impinge on the fundamental rights of the United States born children whose parents become subject to removal because those children would be forced to separate from their family.⁵⁰ By reforming the INA, I will

& Grace Nicholas, *Stay in Touch*, SYDNEY MORNING HERALD, Mar. 4, 1998, at 24 (reporting the position of some individuals that a father who leaves a woman to care for a child alone is "uncaring").

43. See generally Sanger, *supra* note 35, at 381, 384.

44. See TEX. FAM. CODE ANN. § 153 (1998); OKLA. STAT. ANN. tit. 43, §§ 551-101 et seq. (West Supp. 1998).

45. See Or. Juv. Code § 417.375 (West 1999). Through the family plan, the State Office for Services to Children and Families of Oregon provides support to parents and children. See *id.* (providing the requirements of the family plan). The families are then monitored closely to ensure that everything is fine.

46. See generally Valerie Danciu, *Marital Therapy Prevents Pain of Divorce*, THE COLUMBIAN, Apr. 13, 1998, available in 1998 WL 7184735 (stating that couples should find other solutions besides divorce to preserve family unity).

47. See Shusterman, *supra* note 18, at A25 (stating how the "[immigration] law separates families").

48. See generally *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (suggesting that issues pertaining to marriage and family are part of some fundamental constitutional guarantees); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment encompasses the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience. . .").

49. See generally *Franz v. United States*, 707 F.2d 582, 603 (D.C. Cir. 1983) (holding that a child has a constitutionally protected interest in the companionship of his parents).

50. See Gerald L. Neuman, *Effects of Immigration Revision on Children*, 10 GEO. IM-MIGR. L.J. 87, 88 (1996) (stating that "children who are already U.S. citizens or permanent residents would lose the opportunity for reunification with 'non-nuclear' relatives, which may include adult or married brothers and sisters, aunts and uncles and grandparents")

show how Congress is undermining the fundamental rights of families despite the fact that the Supreme Court has established such rights to be fundamental to the rights and liberties of American citizens. This comment will demonstrate how Congress distinguishes between different citizens; it protects a U.S. citizen's (with U.S. citizen children and parents) right to a family, while depriving a U.S. citizen without U.S. citizen parents of the same rights. By changing the INA, Congress effectively classifies U.S. children with undocumented parents as second class citizens.⁵¹ Some commentators perpetuate this classification by arguing that if a naturalized citizen wants to be united with family members, she should think about leaving the country.⁵² In this manner, some Americans believe that children of undocumented parents do become a form of second class citizens.⁵³

In early decisions concerning immigration legislation, the Supreme Court expressed concern that aliens would be deprived of their constitutional rights as far as their families are concerned.⁵⁴ In *Fong Yue Ting*, for example, Justice Field in his dissent, feared that an immigrant's lack of due process would lead to more drastic legislation further depriving aliens of their fundamental rights.⁵⁵ In effect, this is what has happened.

Congress, if truly watchful of family values, would allow undocumented parents, with United States citizen children, to have easier access to permanent residency than other immigrants. As the law currently stands, a child may petition for his parents' residency only if the child is at least 21 years old.⁵⁶ In the case of young children, by the time the child can petition for his previously deported parents, the family will have been separated for the early years of the child's life.

See also Sanger, *supra* note 35, at 386 (stating that if the United States is serious about the harmful effects of mother-child separations, we must ask just as seriously why that concern is sometimes suspended for certain mothers or certain children).

51. See Piatt, *supra* note 16, at 35-36. See also Lee A. Webb, Note, *A Nation That Values Family, Except When a Family Member Is Foreign: An Overview of Proposed Changes in Immigration Law and Their Devastating Effects on Many U.S. Families*, 35 U. LOUISVILLE J. FAM. L. 795, 796 (1997).

52. See Peter Brimelow, *The Case for "Mean-Spiritedness"*, WASH. POST, Oct. 15, 1995, at C4, available in WL 926723. Laws that distinguish between native-born citizens and naturalized citizens that have "simply graduated to citizenship" because they are not on equal footing when it "comes to importing spouses." *Id.*

53. See Piatt, *supra* note 16, at 53-54. Children born to immigrant parents are on the verge of being denied benefits available to children born of United States citizens. See *id.*

54. See *Fong Yue Ting v. United States*, 149 U.S. 698, 760-61 (1893) (Field, J., dissenting) (stating that constitutional guarantees are of value to every resident of the United States, and wondering how far the legislation will go in depriving certain people of those guarantees).

55. *Id.*

56. See INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 1999).

The effect of IIRIRA on the children is detrimental, as children are generally healthier when they live in a two-parent household.⁵⁷ With the changes made by IIRIRA, families will be split up and the children may be forced to live without one or sometimes even both parents. Congress did not take into consideration the effect of IIRIRA on mixed citizenship families when it drafted the legislation.⁵⁸ Instead, it set out a new classification wherein U.S. children with undocumented parents would be second class citizens.⁵⁹ These children are deprived of their fundamental right to a family when their parents are deported. Although Congress recognizes that the Supreme Court has stated that a right to a family is a fundamental right, Congress deprives children of undocumented parents of that right even when those children are American citizens.⁶⁰ The Supreme Court's value of the fundamental right to a family is demonstrated in *Moore v. City of East Cleveland*.⁶¹ The Supreme Court has also recognized that a citizen has the right to live with an extended family.⁶² Again, Congress has taken the ruling in *Moore* and made it applicable to only some citizens, while other citizens are denied those same rights.⁶³

57. See Marilyn Heins, *Boy Whose Dad's Absent Can Learn to Compensate*, ARIZ. DAILY STAR, Nov. 1, 1998, at 5E (stating that fathers can be a source of support for their children as the children grow and mature); Rachel Donnelly, *Separating Parents Should Be Counseled on Children - Clare Role of the State as Parent Discussed at London Gathering*, THE IR. TIMES, Sept. 29, 1998, at 3 (stating that children need parents for an emotionally stable lifestyle). See generally, Joseph Trevino, *Traditions of Giving, Caring, Las Posadas Bring Families Together in a Celebration of Christmas, Faith, and Culture*, L.A. TIMES, Dec. 25, 1998, at B1 (stating how children who do not live in two parent homes feel that they are unwanted).

58. See Michael Huspek, *Casting a Wide Net Over Immigrants*, SAN DIEGO UNION-TRIB., Jan. 21, 1999, at B13:7, 8; B11:1, 3, 4, 5, 6 (stating that the effects of IIRIRA are "far-reaching. . . Families are being irreparably torn apart"). In the aftermath of such consequences, it is unlikely that Congress fully understood or contemplated such an effect on families.

59. See Piatt, *supra* note 16, at 36-37.

60. See Webb, *supra* note 51, at 810 (stating that "Congress has a strong pro-family stance, except when dealing with naturalized citizens and permanent residents").

61. *Moore v. City of Cleveland*, 431 U.S. 494 (1977).

62. See *id.* at 506 (summarizing the majority's position that history and tradition compel a larger conception of family than just a nuclear family).

63. Congress has enacted a new legislation that causes family separation in families of mixed citizenry. See generally Kristen M. Schuler, Note, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 275-77 (1996) (explaining the California proposition that seeks to deprive children of undocumented parents the rights that other children are receiving).

III. CONGRESSIONAL LIMITS ON IMMIGRATION

The IIRIRA of 1996 was not the first time Congress restricted immigration.⁶⁴ Since 1875, Congress has created extensive legislation concerning immigrants and immigration.⁶⁵ Although early immigration policies were extremely lenient, recent legislation has become increasingly specific and controversial.⁶⁶

A. *The History of Immigration Law*

From 1776 to 1875, there were generally no restrictions on either immigration or on immigrants who were allowed to enter the United States.⁶⁷ As the immigrant population increased in the United States, Congress began enacting legislation to restrict immigration.⁶⁸ Between the years of 1875 and 1917, however, the United States saw the implementation of its first immigration reform statutes.⁶⁹ During this period, Congress passed legislation barring convicts and the mentally ill from migrating into the United States.⁷⁰ Congress also passed the "Chinese Exclusion" laws which prohibited Chinese from immigrating to the United States.⁷¹ The Chinese Exclusion laws were not repealed until 1965, when the national origin quotas were repealed by Congress.⁷²

From 1917 to 1924, Congress began to impose specific grounds for exclusion that became the first of many criteria to be added to the INA.⁷³ One of the laws Congress enacted ordered that a person had to be literate

64. See Legomsky, *supra* note 2, at 100-12 (listing changes in immigration legislation throughout the times).

65. See *id.* at 101 (discussing Congressional laws aimed at immigration and certain immigrants).

66. When the immigration restrictions were initially constructed, as will be discussed, very few restrictions existed. See *id.* at 100 (stating that the early years of the country provided no immigration restrictions). Throughout time, Congress has imposed more and more restrictions. See *id.* at 100-10 (providing a historical background of immigration law).

67. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[1] (1996) (revised ed. 1999).

68. See *id.* (demonstrating that early immigration law was aimed at improving conditions and life for immigrants).

69. See *id.* at § 2.02[2].

70. See *id.* (expanding on immigration provisions enacted in 1875 and 1903 which barred the admission of convicts and the mentally ill into the United States).

71. See *id.*; see also Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1120-21 (1998) (describing the drastic implementation of the Chinese Exclusion laws in the 1800's).

72. See GORDON, *supra* note 67, at § 2.02[2] (stating that the Chinese Exclusion Act was an important component in immigration until it was repealed in 1943).

73. See *id.* at § 2.02[3] (discussing the qualitative and numerical restrictions INS officials could consider in exercising their authority to admit or bar certain immigrants).

in order to immigrate.⁷⁴ From 1924 to 1952, Congress toughened the immigration regulations, which had been created up to this point, by enacting more deportability and exclusion grounds.⁷⁵

Since 1952, Congress has continuously amended and created what is now modern-day law.⁷⁶ In 1952, the Immigration and Nationality Act was passed in an effort by Congress to codify all immigration statutes, legislation, and caselaw⁷⁷ into one act. Since its enactment, the INA has seen several amendments (for example, in 1986, 1990, and 1996).⁷⁸ In 1996, the IIRIRA was enacted as an amendment to the INA and has been one of the most radical measures Congress has created prohibiting the admission of certain types of people.⁷⁹ With the IIRIRA, the INA changed dramatically. In general, the IIRIRA increased the requirements that aliens must meet when migrating to the United States and made the requirements tougher for people who wished to immigrate to the U.S.⁸⁰ Because of the new deportation grounds, the number of families who will be separated will increase.⁸¹ IIRIRA enlarged the list of deportable crimes (i.e. added many more aggravated felonies which are now a basis of deportability).⁸² In addition, the majority of sections enacted by Congress do not include any waivers which could make exceptions for some individuals.⁸³

B. *The Goals of Immigration Law*

The goals of the INA of 1952 and of the IIRIRA of 1996 are very distinct. In the IIRIRA, Congress did not mention the goal of maintaining

74. *See id.*

75. *See id.* § 2.02[4] (discussing immigration policy from 1924-1952).

76. *See id.* at § 2.03 [1]-[2][a] (stating that the Immigration and Nationality Act was created in 1952 and has been amended several times since then).

77. *See id.* at § 2.03[2][a].

78. *See* LEGOMSKY, *supra* note 2, at 106-10.

79. *See id.* at 109-10 (stating that IIRIRA was "one of the most sweeping immigration reform packages ever enacted").

80. *See* INA § 212, 8 U.S.C.A. § 1182 (West 1999) (detailing the different inadmissibility grounds).

81. It only follows that with new deportation grounds, more families will be separated because the people being deported have held residences in the United States. Even though there is no exact number of people who will be deported, many more people will be deported because of the new deportability grounds. *See* Mitchell Mittel, *INS Ouster of Criminal and Illegal Aliens Surges*, ROCKY MTN. NEWS, Feb. 22, 1998, at 14A (providing an increase in the number of aliens deported).

82. *See* INA § 101(a)(43), 8 U.S.C.A. § 1101 (a)(43) (West 1999).

83. For example, there is only one waiver for those aliens who are considered to be aggravated felons, that of a pardon by the U.S. president or a state governor. *See* INA § 237(a)(2)(A)(v), 8 U.S.C.A. § 1227(a)(2)(A)(v) (West 1999) (providing for a waiver for aggravated felons).

family unity or re-uniting families.⁸⁴ One goal of the INA of 1952 was to unite loved ones with newly immigrated aliens.⁸⁵ Oddly enough, the Congressmen of 1952 held family integrity – which many modern-day Congressmen champion under the guise of “family values” – in such high regard that they sought to protect it in the immigration laws, unlike their modern-day counterparts.⁸⁶ However, the IIRIRA did not reflect the strong family-oriented goals as the INA of 1952, but rather it aimed at enforcement.⁸⁷ For example, IIRIRA allocates more money in enforcement, thereby increasing the number of border patrol agents.⁸⁸ Such a drastic change is obviated by the fact that there is only one provision for family members or aliens who have been in the United States for a long period of time to obtain relief.⁸⁹

Congress specifically enacted the INA of 1952 to provide for a reunification of families because too many individuals were being separated from their families.⁹⁰ Congress provided for a method by which family

84. See generally *Immigration and Naturalization Services Reform: Detention Issues: Hearings Before the Subcomm. on Immigration Committee on the Judiciary*, 106th Cong. (1998) (testimony of Doris Meissner, Commissioner, Immigration and Naturalization Service, Department of Justice) available in 1998 WL 18089535 (implying that the INS is concerned with detaining illegal immigrants and enforcing the border patrol). In this regard, one may conclude that the separation of families was not a major concern to Congress when enacting IIRIRA.

85. See LEGOMSKY, *supra* note 2, at 131 (contending that family unity was stressed as a central value within the INA of 1952); Fragomen, *supra* note 33, at 61.

86. The INA, by not providing for deportability grounds which would separate families, can be interpreted as trying to keep families together. See Fragomen, *supra* note 33, at 61.

87. See Trucios-Haynes, *supra* note 35, at 250; *Immigration and Naturalization Services Reform: Detention Issues: Hearing Before the Subcomm. on Immigration Committee on the Judiciary*, 106th (1998) (testimony of Doris Meissner, Commissioner, Immigration and Naturalization Service, Department of Justice) available in 1998 WL 18089535 (reaffirming that the INS is mostly concerned with detaining illegal immigrants and enforcing border patrol).

88. See LEGOMSKY, *supra* note 2, at 956-59 (specifying sections of IIRIRA which have increased enforcement efforts along the Mexican border).

89. There is one type of relief available to aliens, that of cancellation of removal. Cancellation of removal allows for aliens to cancel their deportation and retain or adjust their status to that of a legal permanent resident. See INA § 240A, 8 U.S.C.A. § 1229b (West 1999) (providing the requirements an individual must meet). The new standards require an individual to be present for ten continuous years in the United States, and that individual must prove their U.S. citizen children or spouse would encounter extreme and unusual hardship if their parent is forced to leave. See *id.*

90. See Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978 (1990) (providing a section of the Act which promotes family unity); see also Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 522 (1995) (stating that the preoccupation with family

members of United States citizens or lawful permanent residents could migrate into the United States more quickly.⁹¹

One of the main reforms to the INA occurred in 1986 with the passage of the Immigration Reform and Control Act (IRCA).⁹² First, IRCA provided additional deportability grounds.⁹³ Secondly, IRCA instituted an alien legalization program whereby undocumented aliens could gain legal resident status if they met several requirements.⁹⁴ Another amendment, the Immigration Act of 1990, was created to reallocate legal immigration preferences.⁹⁵ In 1996, two different amendments were made to the INA.⁹⁶ The first was the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which expanded deportation grounds and narrowed relief available to both undocumented people and legal permanent residents with criminal records.⁹⁷ The last amendment to the INA was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁹⁸ IIRIRA provides more requirements for people wishing to immigrate to the United States (admissibility grounds) and more deportability grounds for those already in the United States.⁹⁹ Finally, these amendments made immigration increasingly more difficult for aliens.¹⁰⁰

C. *The Preference System Concerning Families*

Prior to IIRIRA, family members were eligible to immigrate without as much difficulty because they had family ties to those already residing in

unification is demonstrated by Congress' 1990 amendment to counteract hardships created by IRCA).

91. See INA § 203(a), 8 U.S.C.A. § 1153(a) (West 1999) (listing the different preference systems created for family members of United States citizens that allow them to enter the United States).

92. See LEGOMSKY, *supra* note 2, at 106-07 (describing different amendments made to the INA).

93. See *id.* at 106-07, 146-59 (discussing the changes made in IIRIRA).

94. See *id.* (identifying that IRCA provided for more employer sanctions, and that the Immigration Marriage Fraud Amendments placed more requirements on aliens who married United States citizens or lawful permanent residents).

95. See *id.* at 107-09 (stating that the 1990 legislation provided for more deportability grounds and also placed yearly limits on the allocation of visas per classification).

96. See *id.* at 109.

97. See *id.* at 109.

98. See LEGOMSKY, *supra* note 2, at 109-10 (noting that IIRIRA provides for more deportability grounds and expedited removal of aliens in the United States).

99. See *id.* at 110.

100. See *id.*

the United States legally.¹⁰¹ The INA allowed a way for families to stay together if the families satisfied several requirements.¹⁰² With the INA, Congress created different classifications to determine who could immigrate to the United States.¹⁰³ These classifications are: family-based immigration, employment-based immigration, and diversity migration.¹⁰⁴ If an individual qualifies for any one of these classifications, is able to provide sufficient evidence stating so, and is within the numerical limits, she will be eligible for a permanent residency visa.¹⁰⁵

In addition to these classification systems, however, Congress also created different preference levels that enabled different relatives of a citizen to immigrate to the United States.¹⁰⁶ For most countries, the higher the preference level, the faster a relative could immigrate to the country.¹⁰⁷ The preferences determine who is eligible for permanent residency.¹⁰⁸ By simply looking at the preference system, it is apparent that one of Congress' goals when it created the INA in 1952, was to provide for family unification.¹⁰⁹

The preference system was created for two reasons. One is that Congress wanted to allow relatives who were closer to the U.S. citizen to immigrate faster into the United States than other relatives.¹¹⁰ For example, the spouse and the children of the citizen were given the first preference so that they could receive their visas, as soon as possible, without enduring a wait.¹¹¹ A brother, for example, would have to wait for a visa

101. See INA § 201(c), 8 U.S.C.A. § 1151(c) (West 1999) (providing for family migration); see also Friedler, *supra* note 90, at 522 (affirming that Congress' intent was to unify families through the 1990 legislation).

102. See INA § 216, 8 U.S.C.A. §§ 1186a (1999) (allowing conditional permanent resident status for certain alien spouses and sons and daughters).

103. See INA § 201, 8 U.S.C.A. § 1151 (1999) (providing for different means to immigrate to the United States). Of course, different types of nonimmigrant visas are also available, but will not be the topic of this paper since most people who obtain nonimmigrant visas return to their native country and do not remain in the United States. See LEGOMSKY, *supra* note 2, at 3 (stating that nonimmigrants are typically temporary entrants).

104. See INA §§ 203(a)-(c), 8 U.S.C.A. §§ 1153(a)-(c) (West 1999).

105. See INA § 203, 8 U.S.C.A. § 1153 (1999).

106. See INA §§ 203(a)(1)-(4), 8 U.S.C.A. §§ 1153(a)(1)-(4) (West 1999) (setting forth the requirements needed for each family-based preference).

107. See LEGOMSKY, *supra* note 2, at 131 (inferring that the preference system determines who obtains visas first).

108. See INA § 203, 8 U.S.C.A. § 1153 (1999) (defining the different preferences).

109. See Fragomen, *supra* note 33, at 61.

110. See INA § 203, 8 U.S.C.A. § 1153 (West 1999); LEGOMSKY, *supra* note 2, at 131 (stating that a goal of the immigration laws has been family unity).

111. See INA § 201(b)(2)(A)(i), 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 1999).

to become available.¹¹² The second reason is that the INS is only allowed to issue a certain number of visas per year.¹¹³ Due to the fact that there are more people that are eligible for a visa than the number of visas available, a severe backlog on visas exists.¹¹⁴ Currently, the backlog is several years, depending on the classification.¹¹⁵ Normally, the higher the preference, the fewer years an alien will have to wait.¹¹⁶

The INA established five preference levels in regard to family immigration.¹¹⁷ However, with the 1990 amendments, the number of levels has been reduced to four.¹¹⁸ The first preference is for unmarried children of United States citizens.¹¹⁹ A U.S. citizen's children will be eligible to receive their visas under this category.¹²⁰ They will be given first choice when visas are issued.¹²¹ The total number of visas which can be issued in

112. See INA § 203(a)(4), 8 U.S.C.A. § 1153(a)(4) (West 1999). Therefore, the siblings receive last preference for immigrating purposes and will ultimately have to wait longer than other people trying to immigrate.

113. See INA § 201(c) - (d), 8 U.S.C.A. § 1151(c) - (d) (West 1999). See also LEGOMSKY, *supra* note 2, at 125 (stating the preference levels set annual numerical limits). Because INS can only issue a certain amount of visas per year, Congress allowed for some aliens to migrate faster than others for family reasons. See *id.* at 131. Therefore, closer family members will be able to migrate faster.

114. Charles C. Foster, *1996 Immigration Act: Its Impact on U.S. Legal Residents and Undocumented Aliens*, 34 Hous. Law. 28 (1997) (discussing a method in which an alien can apply for a visa temporarily and avoid the family-sponsored migration backlog because the backlog is very severe); see Fragomen, *supra* note 33, at 62; Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 92 (1998); Carlos Ortiz Miranda, *United States Commission on Immigration Reform: The Interim and Final Reports*, 38 SANTA CLARA L. REV. 645, 666 (1998) (stating that the legalization program of 1986 created an immense backlog). See generally Trucios-Haynes, *supra* note 35, at 246 (describing a proposition made by the Commission on Immigration Reform in which the visa backlog would be reduced). The backlog for family migration currently requires aliens to wait an exceptionally long amount of time until they receive their visas.

115. See LEGOMSKY, *supra* note 2, at 131-33.

116. See *id.* Aliens from different countries will have to wait a different time than people in the same position in different countries. This occurs because Congress imposed the number of people who could immigrate in one year from a particular country. See *id.*

117. See Fragomen, *supra* note 33, at 61-63 (discussing the differences in the pre-1990 Act and the post-1990 preference levels). As will be explained later, the five preference levels were reduced to four levels with the amendments of the INA. See INA § 203, 8 U.S.C.A. § 1153 (West 1999).

118. See INA § 203(a), 8 U.S.C.A. § 1153(a) (West 1999); Fragomen, *supra* note 33, at 61-63.

119. See INA § 203(a)(1), 8 U.S.C.A. § 1153(a)(1) (West 1999); see also INA § 101(b)(1), 8 U.S.C.A. § 1101(b) (West 1999) (defining a child to be "an unmarried person under twenty-one years" old).

120. See INA § 203(a)(1), 8 U.S.C.A. § 1153(a)(1) (West 1999).

121. See *id.* (indicating the preference given to unmarried children when applying for visas).

one year is set at 480,000 visas.¹²² However, there is a limit on this preference which is set at 23,400 plus any visas that the fourth and last family-sponsored preference aliens do not use.¹²³ The waiting time for people in this category is approximately one year.¹²⁴

The second preference consists of spouses and unmarried children of legal permanent residents.¹²⁵ This section is further divided into two subsections: (a) legal permanent resident's spouse and children who are unmarried and under twenty-one years old; and (b) legal permanent resident's children who are over twenty-one years old and single.¹²⁶ The limit on this preference is 114,200 visas, plus any visas that the first category does not need, per year.¹²⁷ The backlog for this category is approximately three to five years.¹²⁸

The third preference is for married sons and daughters of US citizens.¹²⁹ The limit for this preference is 23,400 plus any visas that the first and second preferences do not use per year.¹³⁰ The waiting time for this category is about three years.¹³¹

The fourth preference concerns the brothers and sisters, twenty-one years old or older, of United States citizens.¹³² The limit on this preference is set at 65,000 visas plus any that the first, second, and third prefer-

122. See INA § 201(c)(1)(A)(i), 8 U.S.C.A. § 1151(c)(1)(A)(i) (West 1999).

123. See INA § 203(a)(1), 8 U.S.C.A. § 1153(a)(1) (West 1999).

124. See *Visa Bulletin*, UNITED STATES DEP'T. OF STATE (Bureau of Consular Affairs, Washington, D.C.), Nov. 1998, at 2 (showing that as of Nov. 1998, the waiting time for most of the first preference aliens is one year and four months). The wait is computed based on the country of origin. See *id.* Some countries have a longer waiting period. See *id.* For example, Mexico has a five year and four month waiting period, while the Philippines have an 11 year, eight month waiting period. See *id.*

125. See INA § 203(a)(2), 8 U.S.C.A. § 1153(a)(2) (West 1999).

126. See *id.*; LEGOMSKY, *supra* note 2, at 125 (defining a "child" for immigration purposes).

127. See LEGOMSKY, *supra* note 2, at 125.

128. See *Visa Bulletin*, *supra* note 124, at 2 (indicating that as of November 1998 the visa wait is four years and seven months for aliens in the second preference). The wait is the same for most aliens with the exception of Mexico whose wait is five years and seven months. See *id.*

129. See INA § 203(a)(3), 8 U.S.C.A. § 1153(a)(3) (West 1996) (specifying that qualified immigrants who are the married sons or daughters of U.S. citizens shall be allocated visas).

130. See *id.*; LEGOMSKY, *supra* note 2, at 125.

131. See *Visa Bulletin*, *supra* note 124 at 2 (indicating that as of November 1998 the wait for aliens in this category is three years and seven months for most countries except Mexico, whose wait is seven years and nine months, and the Philippines, whose wait is ten years and eight months).

132. See INA § 203(a)(4), 8 U.S.C.A. § 1153(a)(4) (West 1999) (providing that qualified immigrants, who are at least twenty-one years old and siblings of U.S. citizens, shall be allocated visas).

ences do not use per year.¹³³ The backlog for this preference is about ten years.¹³⁴

If a person does not fall within these preferences, the opportunity to legally migrate to the United States is very slim.¹³⁵ Family-based migration has been and is currently the category that allows more people to migrate to the United States.¹³⁶

The mere fact that an immigrant has a family member in the United States, either a citizen or a permanent resident, does not mean that an immigrant will be able to immigrate.¹³⁷ Congress has specified several requirements, besides belonging to a preference level, which must be met before an individual is approved to receive residency.¹³⁸

D. *Changes Made by IIRIRA*

IIRIRA made many changes to the INA. One of those, Section 212(a)(4) of the INA, changes the requirement necessary for an affidavit

133. See *id.*; LEGOMSKY, *supra* note 2, at 125 (noting the limit on fourth preference visas).

134. See *Visa Bulletin*, *supra* note 124, at 2 (indicating that as of November 1998 the wait for most fourth category aliens is ten years and seven months). Some countries have a longer waiting period than others. See *id.* For example, aliens from China have to wait about ten years and seven months; aliens from India must wait about thirteen years and seven months; Mexico's wait is eleven years and two months while the wait for aliens from the Philippines is twenty years and four months. See *id.*

135. The INA provides for migration through the processes of employment migration and diversity migration as well. See INA §§ 203(b)-(c), 8 U.S.C.A. §§ 1153(b)-(c) (West 1999) (providing the requirements necessary to immigrate via employment visas and diversity visas). The process for obtaining an employment visa requires the applicant to go through several steps to first receive a labor certification and then more steps to obtaining her permanent residency. See LEGOMSKY, *supra* note 2, at 174-76. The number of visas available through the employment immigration process is also limited to 140,000 visas per year. See INA § 201(d)(1), 8 U.S.C.A. § 1151(d)(1) (West 1999).

Another process through which aliens can receive permanent residency is through diversity. Diversity allows for aliens who do not have any ties to the United States to migrate to the United States; this process is generally referred to "as the lottery" in which people mail their applications to INS specifying that they qualify for such migration. See LEGOMSKY, *supra* note 2, at 204-10. INS then selects people from certain countries whose numbers of migration are very small. See *id.* The level for diversity migration is currently set at 55,000 per year. See INA § 201(e), 8 U.S.C.A. § 1151(e) (West 1999).

136. See generally INA § 203, 8 U.S.C.A. § 1153 (West 1999) (differentiating the number of visas allowed for family migration, employment-based migration, and diversity).

137. See generally INA § 212, 8 U.S.C.A. § 1182A (West 1999) (discussing the different types of excludability grounds by which certain people are barred from immigrating, regardless of other types of qualifications).

138. See LEGOMSKY, *supra* note 2, at 328-31 (providing a description of the visa petition process).

of support to 125% above the poverty level.¹³⁹ Next, the INA was amended to provide more anti-terrorism legislation and thus, make it more difficult for people, with prior criminal history, to migrate to the United States.¹⁴⁰

Congress utilized different studies by anti-immigrant groups which reflected very high levels of immigration into the United States.¹⁴¹ When drafting IIRIRA, Congress' goal was not to unite families.¹⁴² Instead, these studies show that Congress' main goal of enacting the IIRIRA is to cut the legal immigration numbers, regardless of who will bear the consequences.¹⁴³ The anti-immigrant wave overwhelmed Congress and those sentiments against immigrants showed through its adoption of the IIRIRA.¹⁴⁴ The general feeling of xenophobia¹⁴⁵ resulted in an attempt

139. See INA § 213A(a)(1)(A), 8 U.S.C.A. § 1183(a)(1)(A) (West 1996) (setting the limit for the sponsor's affidavit to be at least 125% of the poverty level set by the federal government).

140. See LEGOMSKY, *supra* note 2, at 109 (outlining the AEDPA which requires aliens with terrorist backgrounds to be excluded and deported).

141. See Lisa Levinthal, Note, *Welfare Reform and Limits on the Rights of Legal Residents*, 10 GEO. IMMIG. L.J. 467, 477 (1996) (stating that anti-immigrant discrimination is strongly racist, therefore, the government can create and act upon distinctions between citizens, legal resident aliens and illegal aliens); see also Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 694 (1997) (depicting the view that immigration law has become restrictive because immigration inherently deals with race and culture); Rep. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 901 (1997) (denouncing an immigration system which admits 80% of legal immigrants with regard for education or skill thereby perpetuating the belief that immigrants take jobs from Americans, and are more likely to use public benefits in the United States).

142. See *Immigration and Naturalization Oversight Before the Subcomm. on Immigration of the U.S. Senate Comm. on the Judiciary* (1998) (testimony of Doris Meissner, Commissioner, Immigration and Naturalization Service) (reaffirming that one of the priorities of IIRIRA was to detain immigrants with criminal convictions).

143. See Russell M. Jauregui, *Local View Immigration Laws Punish the Wrong People*, THE PRESS-ENTERPRISE, Sept. 14, 1997, at A19, available in 1997 WL 13964814 (noting that the true effects of the immigration policies suffered by children who are deported to a country that they had never been and did not know the language). See also Doug Chia, et al., *Developments in the Legislative Branch*, 10 GEO. IMMIG. L.J. 285, 287-89 (1996) (stating that different House and Senate bills propose to cut illegal immigration through implementation of strict laws). The new legislation is not attempting to limit a specific group of unwanted aliens, all immigration levels are being cut which leads to the conclusion that the anti-immigrant wave was strong and that the number of immigrants just wanted to be limited. See generally Levinthal, *supra* note 141, at 477 (discussing how recent immigration policies spawned out of the country's anti-immigration sentiments).

144. See Levinthal, *supra* note 141, at 477 (discussing how recent immigration policies affected the United States' immigration sentiments).

145. See THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1418 (8th ed. 1990) (defining xenophobia as a "deep dislike for foreigners").

to limit the number of immigrants entering the United States.¹⁴⁶ It seems these xenophobic feelings were very strong, the issue of family separation was not taken into account.¹⁴⁷ Due to IIRIRA, children will suffer the harmful loss of their parents being deported, thus leaving them without a home.¹⁴⁸

E. *Effects of IIRIRA*

IIRIRA does not address what will happen to the children who are U.S. citizens and cannot be removed along with their parents.¹⁴⁹ When undocumented parents of American children are removed, several concerns arise. First, children will suffer "de facto" deportation when their parents are removed from the United States.¹⁵⁰ If the children stay in the

146. See Webb, *supra* note 51, at 795 (stating that xenophobia was present in the United States).

147. See generally John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 253 (1998) (describing the wait that many family members encounter when trying to obtain visas and unite with their families in the United States); Mary L. Sfasciotti & Luanne Bethke Redmond, *Marriage, Divorce, and the Immigration Laws*, 81 ILL. B.J. 644, 649 (1993) (stating that the Immigration Marriage Fraud Amendment of 1986 prohibited many families from being united). As long as the backlog exists and an increasing number of aliens are petitioning for residency, the wait for family unification continues to grow.

148. Many aliens who are undocumented will be deported from the United States because of their illegal status; thus, their U.S. citizen children are left alone in the United States. See generally Julie Linares-Fierro, Comment, *A Mother Removed-A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard*, 1 THE SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 253 (1999) (discussing issues involving battered immigrant mothers facing deportation). Parents usually want the best for their children and realize that the children will have a better life, in regards to educational opportunities, if they remain in the United States and subsequently forced to find someone to care for the children when the parents are deported. See *id.*

149. See Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 317 (1997) (claiming that the victim of domestic violence would suffer great risks if their batterer husbands were deported). Even if the children resort to public aid, with the new welfare legislation, only citizens would be able to receive public benefits, and then only for a specific time limit imposed by Congress. See *id.* at 317-18. Many of the families who would be split up, with one or both parents being deported, would have no recourse and could possibly end up homeless. See *id.* at 317.

150. "De facto" deportation occurs where United States citizen children of undocumented parents leave the United States when their parents are deported. See *Gallanosa v. United States*, 785 F.2d 116, 120 (1986) (stating the appellant's claim that 'de facto' deportation would occur when the immigrant's daughter leaves the United States with her parents). However, different appellate courts have held that de facto deportation would not occur with the American children. See *Hernandez-Patino*, 831 F.2d 750, 755 (1987) (holding that de facto deportation would not occur with the citizen children); *Gallanosa*, 785 F.2d at 120 (1986) (rejecting appellant's claim that his daughter would suffer de facto deportation).

United States without their parents, they will either be forced to reside with other relatives or be forced to stay in state custody.¹⁵¹ Furthermore, if there is more than one child in the family, those children might be separated and placed in different foster homes. In either case, children who are U.S. citizens, and whose parents are undocumented will suffer the results of IIRIRA. The children will possibly have to resort to public aid and, if eligible, will only be able to do so for a specific time period.¹⁵²

As mentioned earlier, several states in the United States have tried different ways in which they can keep the children and the parents together where custody and parental rights are concerned.¹⁵³ With regard to deportation, however, the anguish of the children during separation from their parents is not considered.¹⁵⁴ It is likely that these children may be placed in foster homes until they become adults.¹⁵⁵ These examples show that Congress failed to consider the future of children who are United States citizens and have the right to have a family.¹⁵⁶

151. Since IIRIRA does not provide for what is to become of the children, one can only assume that if the children remain in the United States, they will become wards of the state and possibly be placed in orphanages and/or foster homes. See generally Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2285-86 (1998) (describing how easily a child can be removed from a parent when the state views the child without a parent, regardless of the time the parent was away from the child); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 704 (1998) (stating that the state "too frequently, and sometimes unnecessarily" removes children from their parents). Similarly, the state could take the children of deported families and place them in foster homes thus making them wards of the state.

152. See Douglas J. Chu, *Medicaid for the Elderly, Blind, and Disabled*, 27 PRACTICING L. INST. 133 (1998) (identifying aliens who qualify to receive welfare benefits in New York State and the time periods for which they can receive the benefits).

153. See OR. JUV. CODE § 417.375 (West 1999) (providing for a family plan to keep children with their parents); Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of "I Do," An Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL'Y 265, 282 (1998) (explaining that Louisiana legislation provides for marriage preservation so the children can live with their parents in a unified family setting).

154. See generally Michael J. Bufkin, *The "Reasonable Efforts" Requirement: Does it Place Children at Increased Risk of Abuse or Neglect?*, 35 U. LOUISVILLE J. FAM. L. 355 (Spring, 1996-1997) (stating that once children are placed in foster homes, the children suffer drastically because they are not with their natural parents).

155. See *id.* at 356 (recognizing that children may stay in foster homes for many years, similar to the Child Welfare Act).

156. See generally Piatt, *supra* note 16, at 36 (acknowledging that sanctions exist against children of undocumented parents, which do not exist for other children).

F. *Waivers Available to Those Who Do Not Meet the Statutory Requirements*

The INA provides some waivers to aliens who do not meet the statutory requirements.¹⁵⁷ For example, waivers apply to some deportation proceedings and to some admission proceedings. One waiver provides for a manner in which a person can circumvent these inadmissibility grounds. Section 212(h) states that an alien can "waive" a ground if he proves that his United States citizen or legal permanent resident spouse, parent, or child would suffer extreme hardship.¹⁵⁸ It is very hard to gain approval for this waiver, and it still requires the immigrant to leave the country, with the fear that he will not return for years to his family. Additionally, this waiver does not apply to many sections of the Act.

The cancellation of removal is another form of relief that does exist.¹⁵⁹ The cancellation of removal is a process where aliens who are in removal proceedings can apply to cancel their deportation.¹⁶⁰ In order to be eligible for this cancellation, four requirements have to be met: the alien has (1) to have lived in the United States for several years (ten years); (2) to be of good moral character; (3) to not been convicted of an immigration offense; and (4) whose deportation would cause exceptional and extremely unusual hardship to a United States citizen spouse or children.¹⁶¹

This waiver is not helpful to aliens who cannot fulfill the exceptional and extremely unusual hardship requirement. Several courts have determined that the issue of separation of family constitutes extremely unusual

157. See LEGOMSKY, *supra* note 2, at 301 (stating that the Act provides for waivers). See also INA § 212(h), 8 U.S.C.A. § 1182(h) (West 1999) (allowing the Attorney General to exercise discretion in granting a waiver where an immigrant alien is excludable because of a particular offense); INA § 240A(a), 8 U.S.C.A. § 1229b(a) (West 1999) (defining another waiver available to those immigrants legally residing in the United States who are deportable under a particular deportability ground). Normally, these waivers apply to aliens who have ties in the United States at the time they petition for residency. See also INA § 212(h)(1)(B), 8 U.S.C.A. § 1182(h)(1)(B) (West 1999) (providing for a waiver when an immigrant has family in the United States). For an alien to qualify for a waiver, she must meet several requirements as outlined by the statute. After the alien meets those requirements, then the Immigration Court exercises its discretion and determines whether or not to grant the alien's waiver. See also INA § 212(h)(2), 8 U.S.C.A. § 1182(h)(2) (West 1999) (stating that the Attorney General has the discretion of approving a waiver). If the person is granted a waiver, then the particular ground for exclusion or deportation is waived and that person can immigrate legally into or reside legally in the United States. See *id.*

158. See INA § 212(h)(1)(B), 8 U.S.C.A. § 1182(h)(1)(B) (West 1999).

159. See INA § 240A(b), 8 U.S.C.A. § 1229b(b) (West 1999).

160. See INA § 240A(b), 8 U.S.C.A. § 1229b(b) (West 1999) (setting out the requirements for and defining cancellation of removal); LEGOMSKY, *supra* note 2, at 474 (explaining and defining cancellation of removal).

161. INA § 240A(b), 8 U.S.C.A. § 1229b(b) (West 1999).

hardship.¹⁶² However, it is clear that family separation will not demonstrate exceptional and extremely unusual hardship. In *Salcido-Salcido v. INS*,¹⁶³ the Ninth Circuit determined that the mere question of separation of families will constitute extreme hardship.¹⁶⁴ In *Salcido*, the mother of the two children would separate from her children because she wanted her two daughters to grow up in the United States and have the advantages of being United States citizens, such as an opportunity for an education; in Mexico, Ms. Salcido would not be able to support her children.¹⁶⁵ Ms. Salcido was in deportation proceedings when she applied for suspension of deportation, now called cancellation of removal.¹⁶⁶ She met all the requirements of that application except for the extreme hardship clause, which both INS and the Board of Immigration Appeals denied.¹⁶⁷ When Ms. Salcido argued that separation from her children would constitute extreme hardship for both herself and the children, the INS and BIA denied her claim.¹⁶⁸ Ms. Salcido subsequently appealed to the Ninth Circuit which stated that the mere fact that she would separate from her children indeed constituted hardship.¹⁶⁹

In determining whether extreme hardship is met, the court must look at several factors.¹⁷⁰ Those factors include "age of the subject; family ties in the United States and abroad; length of residence in the United States; condition of health, conditions in the country to which the alien is returnable; and financial status. . ." among others.¹⁷¹ The Ninth Court of Appeals further stated that when immigrants raise the question of separating

162. See *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) (recognizing that in determining extremely unusual hardship, the fact that a family would separate because of the immigration laws should be a key factor taken into consideration); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423-24 (9th Cir. 1987) (stating that separation of family should be considered when determining extreme hardship); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (stating that the "most important single hardship factor may be the separation of the alien from family living in the United States"). Even though the courts had held that separation of families constitutes extreme hardship, the courts have not decided whether it constitutes exceptional and extremely unusual hardship.

163. 138 F.3d 1292 (9th Cir. 1998).

164. See generally *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998).

165. See *id.* at 1293.

166. See *id.*

167. See *id.*

168. See *id.*

169. See *id.* at 1292 (concluding that extreme hardship was constituted due to deportation, not parental choice).

170. See *Matter of Anderson*, 16 I & N Dec. 596, 597 (BIA 1978) (listing the factors to be considered in determining extreme hardship); *In re C-V-T*, 21 I&N Dec. ___, Int. Dec. 3342, 1998 WL 151434 (BIA 1998) (listing the different factors).

171. See *Matter of Anderson*, 16 I & N Dec. at 597 (providing some of the factors to be considered in determining extreme hardship).

from their family, extreme hardship is present.¹⁷² Thus, INS should grant a family stay because otherwise the family would be separated. In light of the courts' determination that the separation of immigrant family members constitutes extreme hardship which results in harm to children of immigrants, Congress should recognize that Section 212 of the INA causes exceptional and extremely unusual hardship and needs to be amended in order to avoid this outcome. In addition, neither the immigration courts nor the Board of Immigration Appeals have expressly dealt with the issue of what constitutes exceptional and extremely unusual hardship.¹⁷³

IV. THE EFFECT OF SECTION 212(A)(9) IN SEPARATING FAMILIES

Another change that took effect with the passage of IIRIRA is § 212(a)(9).¹⁷⁴ Section 212(a)(9) establishes new bars which prohibit certain aliens, those who have been in the country without documents, from being eligible to immigrate lawfully.¹⁷⁵ In order to evaluate the time period a person has been residing in the United States, the INS reviews the time when the alien entered the country and the time the alien left.¹⁷⁶ Next, INS examines how long the alien resided in the United States without the proper documents.¹⁷⁷ Immigrants who are in the United States unlawfully, or without the proper documentation, for longer than 180 days but less than one year will be barred for three years from applying for permanent residency status, even if otherwise eligible.¹⁷⁸ People who were in the U.S. without documents for more than one year, will be barred for ten years from applying for permanent residency status, even if

172. See *Salcido-Salcido v. INS*, 138 F.3d 1292, 1294 (stating that the BIA abused its discretion when it failed to look at family separation as a factor in determining whether or not to deport a person).

173. See *In re Stanislaw Pilch*, 21 I & N Dec. ___, Int. Dec. 3298, 1996 WL 706595 (BIA 1996) (affirming the fact that extreme hardship is not a definable term which has an absolute meaning); *In re L-O-G*, 21 I&N Dec. ___, Int. Dec. 3281, 1996 WL 40325 (BIA 1996) (stating that a definition of extreme hardship should not be construed so conservatively that aliens are not able to satisfy the requirement); *In re O-J-O*, 21 I & N Dec. ___, Int. Dec. 3280, 1996 WL 393504 (BIA 1996) (acknowledging that several factors can be used to determine whether extreme hardship was met).

174. See INA § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 1999) (pertaining to immigrants who have previously been ordered removed from the United States).

175. See INA § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 1999) (describing the bars for immigrants, who unlawfully resided in the United States, from lawfully immigrating).

176. See INA § 212(a)(9)(B)(i)(ii), 8 U.S.C.A. § 1182(a)(9)(B)(i)(ii) (West 1999) (defining the time period to be used in determining the amount of time the alien was unlawfully present in the United States).

177. See *id.*

178. See INA § 212(a)(9)(B)(i)(I), 8 U.S.C.A. § 1182(a)(9)(B)(i)(I) (West 1999).

otherwise eligible.¹⁷⁹ Section 212(a)(9) applies to anybody in the United States who is currently out of status.¹⁸⁰

Section 212(a)(9) acts as a punishment for those who are in the U.S. illegally.¹⁸¹ During the enactment of §212(a)(9), Congressman Lamar Smith, from Texas, stated that the United States needed to hold aliens accountable for violating the immigration laws by overstaying their non-immigrant visas.¹⁸² Dan Stein, of the Federation for Immigration Reform, also said that the goal was to have aliens follow the laws and not to “reward” people who did not wish to “wait their turn” and go through the normal process.¹⁸³

Section 212(a)(9) will have the effect of separating families where either the father, the mother, or the children have been living in the United States illegally for long periods of time.¹⁸⁴ These families have no recourse but to separate or return as a family to their native country.¹⁸⁵

An example of this can be seen in *Salcido-Salcido v. INS*, a case in which the Ninth Circuit court stated that separation of a family constitutes extreme hardship.¹⁸⁶ Had it not been for the Ninth Circuit’s deci-

179. See INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B) (West 1999).

180. See INA § 212(a)(9)(B)(i), 8 U.S.C.A. § 1182(a)(B)(i) (West 1999) (pertaining to immigrants’ unlawfully residing in the United States).

181. See *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (determining that in some cases deportation is the equivalent of banishment); see also Gregory L. Ryan, *Distinguishing Fong Yue Ting: Why the Inclusion of Perjury As An Aggravated Felony Subjecting Legal Aliens to Deportation Under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 ST. MARY’S L.J. 989, 1010 (1997) (presenting the Banishment-Equivalence doctrine which equates deportation with banishment). Therefore, Section 212(a)(9) causes a family to be separated for a period of time and may be considered a form of punishment.

182. See Frank Trejo, *Changes in Law Alarm Immigrants, Expiration of Provision May Affect Thousands*, DALLAS MORNING NEWS, Sept. 25, 1997, at 33A [hereinafter *Changes in Law*].

183. See *id.* (quoting Mr. Dan Stein, executive director of the Federation for Immigration Reform in Washington, D.C., who stated that the integrity of the immigration process must be upheld and immigrants cannot be rewarded for entering illegally).

184. The section acts to separate families without regard to whom it is separating. As far as the law is concerned, any person in the country without proper documentation, with some exceptions will be held subject to the three or ten year bans. See INA § 212(a)(9)(B)(i) & (iii), 8 U.S.C.A. § 1182(a)(9)(B)(i) & (iii) (West 1999) (providing for exceptions to the bar).

185. The problem in having the entire family return to their native country is that those family members who are United States citizens will be deprived of being in the country of their birth. In effect, these United States citizens will be deprived of the rights that other American citizens receive.

186. See *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292, 1293 (9th Cir. 1998) (stating “the BIA abused its discretion because it failed to consider the hardship to Salcido and her U.S. children if they are separated. . .”).

sion, Ms. Salcido-Salcido would have been barred, for ten years, from obtaining legal permanent residency because she had been in the United States without the proper documentation for longer than one year.¹⁸⁷ As a result, many cases exist where people qualify for visas but because they were illegally present in the United States, will have bars against them.¹⁸⁸

The ban found in § 212(a)(9) will serve to separate families and keep them separated for long periods of time. Before IIRIRA was enacted in 1996, undocumented persons who had been in the United States could leave the country and petition for residency without any additional wait.¹⁸⁹ The law as it stands now requires the alien to return to her home country and petition from there after she has waited the required amount of time (either three years or ten years).¹⁹⁰ The alien will then have to partake in the process, and wait for a visa to become available. The backlog is such that the alien will have to wait anywhere from thirteen to more than twenty years.¹⁹¹ Thus § 212(a)(9) separates families because one person will have to leave the United States while the other members of his family remain in the country. In conclusion, the ban will separate many families for many years.

The bar is also unjust because it punishes many people who were already in the United States before the law was passed. With the enactment of § 212(a)(9), Congress succeeded in keeping many more families from legally immigrating for long periods of time because they had already been in the United States without the proper documentation.

V. THE EFFECT OF THE REPEAL OF SECTION 245(i)

Another section which will work to separate families is § 245(i). With the enactment of IIRIRA, Congress repealed the previous version of

187. In order to apply for suspension of deportation, Ms. Salcido-Salcido would have to establish that she had been physically present for seven years. See *LEIGOMSKY*, *supra* note 2, at 475 (providing the requirements for suspension of deportation). It can thus be assumed that since Ms. Salcido-Salcido was eligible for suspension, she had been present in the United States for more than one year.

188. Many immigrant families have resided in the United States without documentation before obtaining legal permanent residency, and will therefore be subject to a bar. No sources exist which state the number of immigrants in the country.

189. Aliens can still leave the country and interview with the consular officer abroad. However, once the alien leaves the country, the bars will kick in and force the alien to have to wait the statutorily prescribed period before they can immigrate. See INA § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 1999).

190. See *id.*

191. See discussion *infra* notes 124-36 (considering the wait as it now stands plus the extra wait that aliens would have to endure due to the established references, one can see that the wait will constitute many years).

§ 245(i) which allowed qualification under 245 of those who would be barred due to their illegal entry.¹⁹²

Section 245 was originally enacted in 1952 in order to facilitate obtaining visas in the United States and to circumvent the requirement that aliens return to their native country before gaining admission to the United States as a legal permanent resident.¹⁹³ Section 245 allowed an undocumented alien present in the United States awaiting a visa to obtain their visas in the United States without leaving the country.¹⁹⁴ Ordinarily, a person would have to interview with the consulate office in that person's home country and remain there until she obtained the visa.¹⁹⁵

Section 245(i) was established for those individuals who entered the United States illegally but otherwise qualified for adjustment of status under § 245.¹⁹⁶ These aliens could pay a penalty of \$1000 and obtain adjustment of status, without leaving the United States.¹⁹⁷

This section was repealed in 1996 as part of the IIRIRA changes, with an effective date of January 14, 1998.¹⁹⁸ Congress knew of the serious effects the repeal of § 245(i) would bring to the immigrant population.¹⁹⁹ Because Congress was aware of how the immigrant population would be affected, it created several extensions which allowed immigrants to apply for the adjustment of status before the repeal took effect. However, Congress was firm on its decision and the inevitable had to take place; the last extension expired on January 14, 1998.²⁰⁰

As a result of the repeal, several problems were created for immigrants when the repeal went into effect. Many families separated because they

192. See INA § 245(i), 8 U.S.C.A. § 1255(i) (West 1999).

193. See LEGOMSKY, *supra* note 2, at 366.

194. See INA § 245(i), 8 U.S.C.A. § 1255(i) (West 1999).

195. See discussion *supra* note 7 (concerning the petitioning process).

196. See INA § 245(i), 8 U.S.C.A. § 1255(i) (West 1999).

197. See *id.*

198. See *id.* (providing the deadline for aliens to have filed the adjustment of status application).

199. Before Congress enacted the last deadline for filing § 245(i) petitions, Congress had several interim deadlines. See Darrell Satzman, *Pacoima Workshop to Explain Immigration Rules*, L.A. TIMES, Dec. 23, 1997, at B3 (stating that Congress extended the 245(i) deadline to Nov. 13, 1997); Michael Shane, *Immigration Law Update: Extension of 245(i)*, CARIBBEAN TODAY, Nov. 30, 1997, at 3 (stating that the Section 245(i) extension was continued for two more weeks, as of Nov. 7, 1997); Basil Talbott, *Immigrants Rush to Beat Deadline // Visa Applications Must be Filed Today*, CHI. SUN-TIMES, Jan. 14, 1998, at 16 (stating that Jan. 14, 1998, was the last extension for Section 245(i)). Congress, therefore, knew of the immigrant population that would be adversely affected by the repeal of § 245(i), and consequently had several deadlines before it provided for the repeal of § 245(i).

200. See INA § 245(i)(1)(B)(i), 8 U.S.C.A. § 1255(i)(1)(B)(i) (West 1999) (providing that any applications for adjustment of status must be filed by January 14, 1998).

could not afford to pay the penalty.²⁰¹ In different communities, composed of families with undocumented immigrants, applying for an adjustment of status for more than one person was impossible because of the expensive penalty. Therefore, these families would be required to separate because the adjustment could not be obtained. Even though many American families would not be able to pay the excessive fine, § 245(i) provides an opportunity for families to save money to pay the fine for a family member or members. Families were forced to prioritize which family members would receive the adjustment instead of others. Without this opportunity for immigrant families to remain together, they would simply have to separate, leave their children behind in the United States and return to their home country.

VI. THE EFFECT OF SECTION 212(A)(4) TOWARDS FAMILY MEMBERS

Even if prospective immigrants overcome the requirements, the final often insurmountable hurdle immigrants experience is the new affidavit of support imposed in section 212(a)(4). One of the requirements that an immigrant must satisfy when applying for residency through the family-based preference is a showing that she is not a "public charge" as stated in INA § 212(a)(4).²⁰² If INS considers an immigrant to be a public charge, INS can reject their petition.²⁰³ In order to provide a clear basis of who is, or who may become, a public charge, Congress provides factors which allow a person to show that she is not and will not become a public charge.²⁰⁴ Additionally, if a person is deemed a public charge, she can provide an affidavit of support according to 213A, which outlines the requirements needed for the affidavit and in conjunction with § 212(a)(4) works to separate families.²⁰⁵ This standard is abstractly imposed without regard to the fact that some legal immigrants live below the federal poverty level without a threat of becoming a public charge.

201. No firm statistics currently exist because there is no way to account for the undocumented immigrant population in the United States. Therefore, it can only be assumed that families separated because they could not meet the \$1000 penalty. The immigrants returned to their home country where they could begin the petitioning process and interview with a consular officer abroad.

202. A "public charge" is defined as someone who appears to, at one point after being admitted into the United States, become a burden on the United States. See INA § 212(a)(4), 8 U.S.C.A. § 1182(a)(4) (1999).

203. See *id.* (stating that "any alien . . . in the opinion of the consular officer . . . is likely at any time to become a public charge is inadmissible").

204. See INA § 212(a)(4)(B), 8 U.S.C.A. § 1182(a)(4)(B) (West 1999).

205. See INA § 212(a)(4)(B)(ii), 8 U.S.C.A. § 1182(a)(4)(B)(ii) (West 1999) (providing for an affidavit of support to be used); INA § 213A(a), 8 U.S.C.A. § 1182a(a) (West 1999) (setting the requirements for the affidavit of support).

Since the 1880s, Congress prohibited the entry of immigrants who were "unable to take care of himself or herself without becoming a public charge."²⁰⁶ In determining whether a person is a public charge under IIRIRA, several factors are taken into account.²⁰⁷ Those factors include: age, health, family status, assets, resources, financial status, and education skills.²⁰⁸ However, if that person cannot fulfill those factors satisfactorily, she is allowed to produce an affidavit of support from a sponsor who attests that she will provide for the applicant.²⁰⁹ Prior to the 1996 amendment, the sponsor need only show that she can provide for the immigrant "so that the alien will not become [a] public charge."²¹⁰

However, the IIRIRA changed many provisions concerning the affidavits of support.²¹¹ With the 1996 amendment, sponsors now have to meet 125% of the poverty level for her family and the alien's family.²¹² It is not necessary, however, that the sponsor earn more than 125% with her income alone; she can also use some of her assets to meet the poverty level requirement.²¹³ Thus, the sponsor must show that she earns, or owns, at least an amount that is 125% of the poverty level.²¹⁴ The sponsoring party can also combine the incomes of other people living in the same household to meet the requirement; however, the supplemental sponsors must demonstrate that they meet the 125% of poverty level, and are bound by their affidavit.²¹⁵

206. LEGOMSKY, *supra* note 2, at 316 (quoting Act of Aug. 3, 1882, ch. 376, § 2, 22 stat. 214 (1882)).

207. See INA § 212(a)(4)(B)(i), 8 U.S.C.A. § 1182(a)(4)(B)(i) (West 1999) (providing the different factors to be taken into consideration when determining whether a person is a public charge).

208. See INA § 212(a)(4)(B)(i), 8 U.S.C.A. § 1182(a)(4)(B)(i) (West 1999).

209. See INA § 212(a)(4)(B)(ii), 8 U.S.C.A. § 1182(a)(4)(B)(ii) (West 1999).

210. See INA § 213A, 8 U.S.C.A. § 1183a (West 1991) (amended 1996) (setting the limit for the affidavit of support at the poverty level).

211. See INA § 213A(a)(1)(A), 8 U.S.C.A. § 1183(a)(1)(A) (West 1999) (setting the requirements and limits for the sponsor's annual income to be at least 125% of the national poverty level).

212. See INA § 213A(a)(1)(A), 8 U.S.C.A. § 1183(a)(1)(A) (West 1999).

213. See INA § 213A(f)(6)(A)(ii), 8 U.S.C.A. § 1183a(f)(6)(A)(ii) (West 1996) (allowing sponsors to meet the 125% income requirement through the use of significant assets of the sponsored alien or the sponsor); see also Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 759 (1998) (explaining the new immigration law to provide for taking into account assets as part of the affidavit of support for sponsors).

214. See Sheridan, *supra* note 213, at 756 (stating how a sponsor can use her income and assets to meet the requirement).

215. See INA § 213A(f)(2), 8 U.S.C.A. § 1183a(f)(2) (West 1999) (creating the availability of other people to join the sponsor in fulfilling the 125% income requirement); Sheri-

This affidavit is rendered a legally binding contract.²¹⁶ It may be enforced by the alien, by the federal government, or by any state.²¹⁷ If the alien requests any public assistance during a fixed time period, the sponsoring party will be held liable for the amount the alien receives.²¹⁸ The sponsoring party will then have to repay that money to the state.²¹⁹ The affidavit is binding until the alien becomes a citizen (with a minimum of three to five years as a legal permanent resident)²²⁰ or has worked for forty qualifying quarters according to the Social Security Administration (at least ten years).²²¹

However, if at any time before naturalization the alien receives public welfare or public funding, the sponsor will be held liable for the amount the alien received.²²² In the event the alien does receive public benefits, either the federal government or the state government can sue the sponsor to recover those monies paid.²²³ Theoretically, the alien may also sue the sponsoring petitioner if the petitioner is unable to provide for the alien, thus forcing the petitioner to provide for him.²²⁴

dan, *supra* note 213, at 760 (explaining how the new immigration act allows joint sponsors to satisfy the 125% income requirement).

216. See INA § 213A(a)(1)(B), 8 U.S.C.A. § 1183a(a)(1)(B) (West 1999) (declaring that the affidavit will be legally binding).

217. See INA § 213A(a)(1)(B), 8 U.S.C.A. § 1183a(a)(1)(B) (West 1999) (indicating the sponsor's affidavit of support "is legally enforceable against the sponsor by the sponsored alien, the Federal Government, [or] any State. . .").

218. See INA § 213A(b)(1)(A), 8 U.S.C.A. § 1183a(b)(1)(A) (West 1999) (holding a sponsor responsible to the government for the reimbursement of any public benefit received by the sponsored alien). The sponsor remains liable, until the sponsored alien has worked forty qualifying quarters as defined by the Social Security Act. See INA § 213A(a)(3)(A), 8 U.S.C.A. § 1183a(a)(3)(A) (West 1999) (stating that an affidavit of support is no longer enforceable once the sponsored alien has worked forty qualifying quarters).

219. See INA § 213A(b)(1)(A), 8 U.S.C.A. § 1183a(b)(1)(A) (West 1999) (setting the standards used when determining how a sponsor will repay any federal public benefits the alien received).

220. See INA § 213A(a)(2), 8 U.S.C.A. § 1183a(a)(2) (West 1999) (declaring that the affidavit of support is void once the alien naturalizes).

221. See INA § 213A(a)(3)(A), 8 U.S.C.A. § 1183a(a)(3)(A) (West 1999) (stating an affidavit of support is unenforceable after the alien has worked forty qualifying quarters as rendered under the Social Security Act).

222. See INA § 213A(b)(1)(A), 8 U.S.C.A. § 1183a(b)(1)(A) (West 1999) (stating the sponsor must reimburse the appropriate government or non-governmental agencies which provided any public benefit to the alien).

223. See INA § 213A(b)(1)(B), 8 U.S.C.A. § 1183a(b)(1)(B) (West 1999) (empowering the Attorney General and the "appropriate Federal agencies" to "prescribe such regulations as may be necessary to carry out subparagraph (A)").

224. See INA § 213A(a)(1)(B), 8 U.S.C.A. § 1183(a)(1)(B) (West 1999).

With the new affidavit of support, undoubtedly a number of families will be adversely affected. Immigrant's income and earnings varies from source to source. However, for the most part, more than half of Hispanic families earn less than \$15,000 a year.²²⁵ Because of the increase in the affidavit amount, many families will not be able to "afford" the new regulations.²²⁶ Thus, individuals who wish to sponsor family members will be barred from doing so if they do not earn as much as is required by the new act.²²⁷

In addition, when considering the affidavit of support, only the income and assets from the sponsoring petitioner are taken into consideration.²²⁸ Although aliens will likely work once authorized, their potential income is not taken into account in regard to the affidavit of support.²²⁹ This is especially detrimental in cases where a female permanent resident is petitioning for her alien husband.²³⁰ In this situation, only her income, and not the earning potential of her husband, will be taken into account when determining the affidavit.²³¹ Since studies have shown that females earn

225. See CHERYL RUSSELL & MARGARET AMBRY, *THE OFFICIAL GUIDE TO AMERICAN INCOMES: A COMPREHENSIVE LOOK AT HOW MUCH AMERICANS HAVE TO SPEND, WITH A SPECIAL SECTION ON DISCRETIONARY INCOME* 43 (1993) (graphing Hispanic families' income from 1972-1991). No sources really exist which document the exact earnings and income of immigrants because the immigrants we are concerned with are undocumented, do not file income taxes, and do not have valid social security numbers. However, since the majority of recent immigrants have been Hispanics or Latinos, the income distribution of this groups is being used to demonstrate that immigrants, in general, earn less than a United States citizen.

226. See *id.* (providing statistics showing that 53.2% of Hispanic men earn less than \$14,999). It is only logical to assume that at least 53.2% of families are under the federal poverty level, which in 1996 was \$15,600 for a family of four. See LEGOMSKY, *supra* note 2, at 318 (providing a table listing the federal poverty guidelines for 1996).

227. See LEGOMSKY, *supra* note 2, at 317-18 (implying that if a sponsor does not meet the affidavit requirement, the sponsor cannot petition for the alien).

228. See INA § 213A(f)(6), 8 U.S.C.A. § 1183a(f)(6) (West 1999) (demonstrating the means to maintain income for the affidavit of support).

229. See INA § 213A(f)(6), 8 U.S.C.A. § 1183a(f)(6) (West 1999).

230. This facet is important because women generally earn less than men; therefore, immigrant women cannot successfully petition for their husbands, even if their husbands were to earn more if they became legal permanent residents. See RUSSELL, *supra* note 225, at 104 (providing that in 1991 the majority of female-headed households were in poverty with a median income of \$12,132 a year); Wynn R. Huang, Comment, *Gender Differences in the Earnings of Lawyers*, 30 COLUM. J.L. & SOC. PROBS. 267 (1997) (citing the U.S. Bureau of the Census which states that in 1996, women earned 76.4 cents for every dollar that men earned); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage*, 84 VA. L. REV. 509, 546 (1998) (stating that the earning gap between unmarried childless women and men is closing, but that women in general, are still earning less than men).

231. See INA § 213A(f)(6)(A)(i), 8 U.S.C.A. § 1183a(f)(6)(A)(i) (West 1999) (indicating the sponsor must demonstrate means to maintain income); see also Michael A. John-

less than males, the likelihood that the wife alone will earn enough to meet the 125% poverty level is lower than that of males.²³² As a result, families will be separated because they cannot meet the income requirements.

Another factor that will work towards separating families is the fact that INA section 212(a)(4) does not allow a waiver for those who are unemployed or fail to obtain an affidavit of support.²³³ Waivers are important because they allow an alien to meet the requirements of a particular section she otherwise would not be able to satisfy.²³⁴ More importantly, waivers authorize a person to qualify for a particular section by making an exception.²³⁵ Once an individual qualifies for a waiver, that individual is said to have satisfied the requirements of that section.²³⁶ Waivers are authorized by the INA statute and are deemed equivalent to satisfying a section.²³⁷ However, Congress does not provide for a waiver of an alien's need to establish that they will not become a public charge.²³⁸ The burden is on a petitioning alien to establish that she is not a public charge to the United States.²³⁹

Another concern arises when the person petitioning for an alien is not generally the same person who can satisfy the affidavit of support requirement.²⁴⁰ For those who cannot meet the affidavit of support requirement either by one or more sponsors, there is no recourse available

son, Note, *A Gap in the Analysis: Income Tax and Gender-Based Wage Differentials*, 85 GEO. L.J. 2287, 2288 (1997) (providing different explanations of why women are being paid less than men).

232. See RUSSELL, *supra* note 225, at 73 (providing a listing of income inequities between males and females in 1991); Johnson, *supra* note 231, at 2288.

233. No waiver exists for individuals who cannot meet the public charge doctrine. See INA § 212(a)(4), 8 U.S.C.A. § 1182(a)(4) (West 1999).

234. Waivers in effect, ignore the ground of exclusion or deportability that the alien is being charged with. For example, INA section 212(h)(2) allows an alien to obtain a waiver. What this means, is that once the alien establishes some of the set requirements, she will be granted a visa or adjustment of status. See INA § 212(h)(2), 8 U.S.C.A. § 1182(h)(2) (West 1999).

235. See INA § 212(h), 8 U.S.C.A. § 212(h) (West 1999).

236. See INA § 212(h)(2), 8 U.S.C.A. § 1182(h)(2) (West 1999) (granting the Attorney General discretionary authority to permit a waiver and consent to the alien's request for a visa or adjustment of status).

237. See generally Rosemary Williams Hill, *Trying Sex Offense Cases in Massachusetts*, MASS. CONTINUING LEGAL EDUC. §13(f) (1997) (stating that several waivers exist to overcome the difficult to meet immigration requirements).

238. See INA § 212(a)(4), 8 U.S.C.A. § 1182(a)(4) (West 1999).

239. See *id.*

240. See INA § 213A(a)(1), 8 U.S.C.A. § 1183a(a)(1) (West 1999).

for those aliens.²⁴¹ Of course, if at one point a petitioner cannot satisfy the affidavit requirement, the petitioner can at a later time provide the correct documentation in order to meet the requirements needed.²⁴² At that time, INS officials and the consulate abroad can review the information again and either admit or deny the application.²⁴³

Many families could not meet the 100% poverty line which was in effect before 1996, and with the new requirement of 125% of the poverty line, many more families will not be able to satisfy that requirement.²⁴⁴ With immigrant families earning less than an American family, many families will not be able to meet the requirement. A Caucasian family in 1991 had an average income of \$31,569 whereas the average income for a Hispanic family was \$22,691 in 1997.²⁴⁵ In 1996, the poverty level was considered a yearly income of \$15,600 for a family of four.²⁴⁶ The sponsor would have to count the number of members in his household and then count the number of people on the INS petition.²⁴⁷ Using this family number, INS utilizes the Poverty Income Guidelines prepared by the Department of Health and Human Services to meet that requirement. Next, the Department of Justice adds 25% of that income to determine the 125% income requirement which aliens must meet.²⁴⁸ As demonstrated by these statistics, many families will not be able to meet the 125% requirement set forth by the new legislation.²⁴⁹ The income requirement is even tougher to meet for some individuals, such as female-head households and families with many household dependents.²⁵⁰

241. Section 212(a)(4) currently does not provide for any waiver for a person who does not satisfy the financial support requirement, with the exception of a provision for battered women. See INA § 212(a)(6)(A)(ii), 8 U.S.C.A. § 1182(a)(6)(A)(ii) (West 1999).

242. Nothing exists in the legislation that prohibits aliens from applying or petitioning at a later time when the alien meets all the immigration requirements applicable to the alien.

243. The alien will petition through the normal process as described in *supra* note 6.

244. See RUSSELL, *supra* note 225, at 43 (providing that 53.2% of Hispanic families (aggregately) earned less than \$15,000 in 1991).

245. See *id.* at 67-69.

246. 61 Fed. Reg. 8286 (1996).

247. See LEGOMSKY, *supra* note 2, at 317.

248. See *id.* at 318 (listing the poverty income guidelines necessary for the affidavit of support).

249. Families cannot meet the requirements because of their low income earnings and their inability to meet the high income requirements imposed by the INS.

250. See RUSSELL, *supra* note 225, at 197 (showing that several American families were in poverty). It is logical to infer that some families cannot meet the income requirements.

Also, many American-born families could also not meet the 125% income requirement.²⁵¹ Congress created a statute where many families will not be united because of the income requirement. Specifically, section 212(a)(4) has had the effect of separating families because they do not have the income now required to remain united. Those who cannot afford to meet the income requirement, will be separated from their families.²⁵² In essence, it seems that Congress created this section which can be "bought" by those who are able to meet the requirement. Meanwhile, those who cannot afford it, will be without their families. Basically, Congress is allowing an alien to pay for the green card and obtain permanent residency. For example, under INA § 203, a millionaire can obtain legal permanent resident status and not have to endure the waiting line if she can start a company and hire American workers.²⁵³ Even though section 203 provides another avenue for immigrants to gain residency, this avenue is not available for undocumented immigrant families residing in the United States.

VII. PROPOSING A LEGALIZATION PROGRAM

This problem could easily be remedied by Congress retracting some of the implementations to the INA caused by IIRIRA. For instance, Congress can repeal section § 212(a)(4) and change the income requirement back to 100% of the poverty level so that families may be able to meet the requirements. With income requirements set at 100%, families will have more of an opportunity to stay together if permitted to meet a lesser qualification. Moreover, families who qualified before the enactment will again be allowed to meet the requirement and meet the poverty charge guidelines.

Next, Congress should repeal the § 212(a)(9) ban because it imposes an undue punishment on immigrants. A repeal of § 212(a)(9) would allow families, who currently live together, to remain together, if a family member leaves the country for a short period of time. Thus, a person who leaves the country for a consular visit to obtain a visa would be allowed to return to the United States without having to wait any period of time. This section, as it stands currently, will separate the families of mixed citizenship, the families who would be most affected. Without the bar,

251. See *id.* at 197, 273 (providing the statistics that 11.5% of all families in 1991 were in poverty).

252. Through the employment visa program, Congress allows a wealthy person to obtain permanent residency if she were to invest one million dollars into the American workforce. See INA § 203(b)(5), 8 U.S.C.A. § 1153(b)(5) (West 1999).

253. See INA § 203(b)(5), 8 U.S.C.A. § 1153(b)(5) (West 1999) (providing the requirements for an employment-based visa).

family members could travel abroad to obtain their necessary visas and return to the United States, without any problems and thereby, be reunited with their families.

Congress realizes that the repeal of section § 245(i) was detrimental to immigrants and their families. A proposal is currently before Congress in which § 245(i) would allow those immigrants who entered the country without proper documentation to adjust their status to permanent residency without leaving the United States.²⁵⁴

Finally, Congress should adopt another legalization program comparable to the Immigration Reform and Control Act of 1986. With the new legalization (usually referred to as amnesty), many people would be allowed to adjust their status without suffering from any of the previously mentioned sections. Legalization under IRCA provides a mechanism for people who were in the country without the proper authorization to gain residency.²⁵⁵

Juan,²⁵⁶ a United States citizen, became a permanent resident in 1988 through the IRCA legalization program. He had been in the country since 1978 holding different employment, primarily in factories. Juan qualified under IRCA and subsequently became a United States citizen in 1991. He married his wife, who is in the process of becoming a citizen, and has two children, who were born in California. Juan has been employed at a national restaurant chain as a truck driver for approximately eight years. Juan and his family own their house and have several automobiles. Juan is an outstanding member of his community and was able to change his life around through the legalization program. Without the program, it is undisputed that Juan would not have been able to lead the life he is leading now.

With a legalization program similar to the 1986 IRCA program, many immigrants who now seem without hope, will have a chance to gain permanent residency. Congress is aware that several not-for-profit groups are requesting such programs and several analysts have confirmed that since there are many undocumented immigrants in the United States, the best manner to help and decrease this ever growing problem is to provide

254. See H. R. Res. 2680, 106th Cong., 145 CONG. REC. H6963 (1999) (specifying that H.R. 2080 concerns restoring section 245(i) to benefit those undocumented in the country); H. Res. 1841, 106d Cong., 145 CONG. REC. H.3294 (1999) (proposing H.R. 1841 to bring back section 245(i) concerning adjustment of status).

255. See LEGOMSKY, *supra* note 2, at 499 (noting that IRCA provides "amnesty" for those unlawfully in the United States by allowing them to change their status while in the country).

256. His name was changed to protect his identity. I am a member of an immigrant community in which several individuals gained residency through the 1986 Act. No further identification of him will be provided.

for legalization effective for all undocumented immigrants in the country.²⁵⁷ Congress, in addition, knows how much the legalization program helped undocumented immigrants.²⁵⁸ Recently, the courts declared that the INS had been misinterpreting the law concerning legalization.²⁵⁹ INS had misread a portion of the 1986 Act to mean that several thousand immigrants were ineligible to receive amnesty.²⁶⁰ The court thus stated that those individuals who were previously denied residency because of their presence outside the United States, had another opportunity to prove the residency requirement and gain permanent residency.²⁶¹

Thus, the only manner in which the undocumented immigrants will be helped is through another general country-wide legalization program. With this proposal, many undocumented immigrants will benefit, especially those with United States citizen children who will now not have to be separated.

VIII. CONCLUSION:

With the changes in INA through IIRIRA, the choices which face many immigrant families are complicated. Caught in the limbo state, many people who were previously simply waiting for a visa to become

257. See Alfredo Corchado, *Illegal Immigrants; Shortage of Workers Spurs Talk of Amnesty*, MORNING STAR, June 22, 1999 at 1A; Finlay Lewis, *Immigrant Amnesty Bill Sought Would Link Farm Work to Quest for Legal Status*, SAN DIEGO UNION-TRIBUNE, July 29, 1999, at A1 (stating how lawmakers are proposing a new legalization program for immigrant farm workers); Bruce Lieberman & Leonel Sanchez, *Farm Labor Issues Stir Fresh Debate*, THE SAN DIEGO UNION-TRIBUNE, July 29, 1999, at A1 (affirming that a new amnesty program is in the works for farm workers); Frank W. Ricci, Editorial, *Miami Beach Event Proves INS Won't Be Evenhanded*, THE PALM BEACH POST, July 13, 1999, at 9A (calling for an amnesty legalization program); Dan Stein, *Senator Sends Mixed Messages on Illegal Immigration*, THE WASH. TIMES, June 16, 1999, at A16 (stating how Senator Abraham, Chair of the Senate Judiciary Subcommittee on Immigration, is engineering another amnesty program for Central American undocumented immigrants).

258. See Lewis, *supra* note 257, at A1 (establishing that about 2.7 million undocumented people qualified under the legalization program of 1986 to gain residency); Alex Pulaski, *Move to Legalize Farm Workers Takes Root on Capitol Hill*, PORTLAND OREGONIAN, July 4, 1999, at D01 (stating that in 1986, three million people benefited through amnesty by gaining their green cards).

259. See Reuters, *Judge Orders INS to Accept Amnesty Pleas*, WASH. POST, July 4, 1999, at A03 (stating that a federal judge held that INS had been misinterpreting the law in regard to immigrants obtaining residency). The court held that INS misinterpreted the law regarding the time that an alien had traveled abroad when denying their applications for residency. See *id.*

260. See *id.* (claiming that when INS refused to consider applications by those immigrants who left the U.S. between May 1987 to May 1988, those immigrants brought suit).

261. See *id.* (quoting U.S. District Judge William Keller that "[D]efendants shall accept and adjudicate applications for legalization. . . of plaintiff class members who attempted to file a completed application. . . with the INS during the [amnesty] period").

available are now forced to choose between a permanent undocumented state or a forced separation of three or ten years. Several immigrant families have also been disappointed by Congress and many have lost faith in the United States government.²⁶² The IIRIRA, in § 212(a)(9), § 212(a)(4), and the repeal of § 245(i), thus punishes families for having chosen the value of unity. Even though the law did not legally allow their entry, they chose to unite with their family. The punishment now is too severe and should not be retained. The financial punishment of the former 245(i) was much more proportionate to the "violation" that had occurred. Finally, whatever the effects on the immigrant aliens are, there would also be a detrimental effect on American children, who would undoubtedly be deprived of their rights to marriage, family and the union between their parents.²⁶³

In many cultures, family is very important and it is expected that the family will remain together.²⁶⁴ Because of § 212(a)(9), the repeal of 245(i), and the new requirement of § 212(a)(4) many families will be separated. Furthermore, as if the sections by themselves are not harsh enough, many families will not only be affected by one section but by a combination of two, three or more sections. The combination of the three sections will leave immigrant families without any recourse whatsoever. For example, an individual who resided in the United States for one year illegally, would be barred for ten years from petitioning for residency.²⁶⁵ That same individual, once the ten years had been met, will have to provide an affidavit showing an income of 125% above the poverty line.²⁶⁶ Satisfying that requirement could take many months or possibly even years to satisfy because wages outside the United States are lower. Once the individual has satisfied the income requirement, she would then wait to receive her visa. The time added by those sections

262. See generally William Wong, *Welfare Reform Needs Fixing: The Greatest Burden Was Put on the Most Vulnerable Segment of Our Population*, GREENSBORO NEWS & REC., Feb. 8, 1999, at A9 (stating how the feelings of immigrants changed positively when Congress restored welfare benefits to legal immigrants).

263. See *Griswold v. Connecticut*, 381 U.S. at 479, 486 (1965) (stating that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

264. See Mai Pham, *Inviting Ancestors to New Year Feast*, S.F. CHRON., Feb. 17, 1999, available in 1999 WL 26880703 (describing how in Confucian thought, current family and ancestors are very important to the Asian culture); Punch Shaw, *How Willy Loman's Nation Has Changed and Hasn't*, FT. WORTH STAR-TELEGRAM, Feb. 7, 1999, at 8 (stating that America is emphasizing the importance of family in its culture); Philip M. Walden, *Lifestyle is Perverted*, ARIZ. REPUBLIC, Feb. 16, 1999, at B6 (stating the importance of marriage and family in America's Culture).

265. See INA § 212(a)(9)(B)(i)(II), 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (West 1999).

266. See INA § 213(a)(1)(A), 8 U.S.C.A. § 1183(a)(1)(A) (West 1999).

would be an additional amount of time that the family would be separated. Even if the amount requirement would be met, isn't separation of families too high a cost to demand from immigrants?

Also, because of the often drastic differences in socioeconomic conditions between the United States and countries immigrants return to, many people will be severely hurt for many years by these three sections. The families would then be separated until they are able to satisfy the monetary requirements.

Finally, since family is very important to different cultures, the entire family may return to their native country. This is detrimental to the children, because many immigrant families would return to third world countries where United States citizen children would suffer many hardships. Many families would much rather leave as a whole instead of being subjected to such bars later. Contrary to popular belief, many immigrants wish to be law-abiding American citizens and will attempt to do so. This is the case with many families because parents do not want to separate from their children. Ultimately, this will lead to the deportation of United States citizens simply to "get rid" of one or two undocumented people in that family. In the case given at the beginning of this comment, Marta will return to Mexico, without her citizen children or her husband, if she is deported.

